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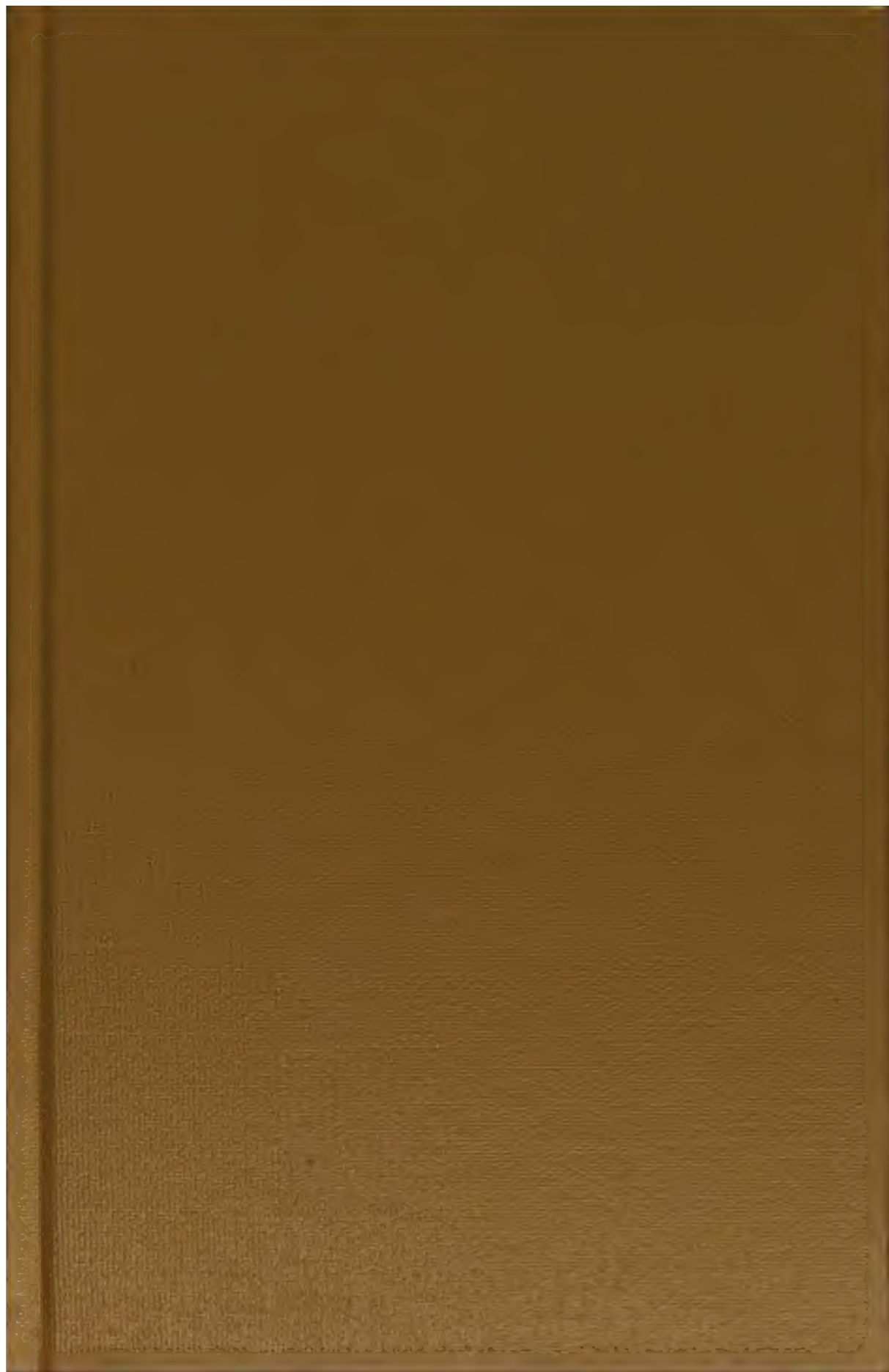
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A  
TREATISE ON THE LAW  
OF  
PROMISSORY NOTES  
AND  
BILLS OF EXCHANGE.

BY  
THEOPHILUS PARSONS, LL.D.

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, AND AUTHOR OF TREATISES ON THE LAW  
OF CONTRACTS, ON THE ELEMENTS OF MERCANTILE LAW, ON MARITIME LAW,  
AND THE LAWS OF BUSINESS FOR BUSINESS MEN.

IN TWO VOLUMES.

VOL. I.

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## P R E F A C E .

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To the many existing works on the Law of Notes and Bills, I have added another, in which I endeavor to cover a wider ground. I have tried to present, in the text, every important question in relation to this topic which has been considered in the courts of England or any of the United States, with the best conclusions I could form. In the notes, I have cited very fully the cases bearing upon these questions,—much the larger part of them by name, volume, and page only,—that those who wish to do so may pursue the investigation through the original authorities. I have also quoted, freely, apposite passages from the most important or instructive decisions, with the purpose of meeting, so far as that is possible, the growing difficulty of accumulating in our libraries a complete series of all the published Reports; a difficulty which is so great, and increases so rapidly, that it will compel a reform. It is not desirable that this reform should be accomplished by withholding the decisions, but by compressing them. Some of the learned essays which our Reports contain are very valuable. But it might be a benefit to the courts, to the profession, and to the community, if an avoidance of diffuse and discursive argumentation should give to the decisions point, precision, and weight, and permit a single volume to contain, and to express distinctly, all the law which must now be sought in very many, with much labor, and sometimes imperfect success.

T. P.

CAMBRIDGE, September, 1862.



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THESE volumes were stereotyped before the Statute of the United States imposing stamps was enacted. An APPENDIX has been added at the close of the text of the second volume, immediately before the Index, containing an accurate reprint of the provisions of the Statute in relation to Bills, Notes, Letters of Credit, Drafts, Orders, and Checks ; together with an examination of the questions which the Statute suggests ; and the English authorities upon those questions which have arisen under the English Stamp-Acts and may arise under our own.

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# THE LAW OF NOTES AND BILLS.

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## CHAPTER I.

### OF THE ORIGIN AND FUNCTION OF NOTES AND BILLS.

THE origin of negotiable bills of exchange is not certainly known. It has been much disputed in what ages and among what nations they arose. But the opinion, or rather the conjecture, of some writers, that they, or instruments very like them, were known among the Romans and Grecians, has been shown to be without foundation. It is, however, certain, that such a transaction as a request by A in Rome that B in Alexandria should pay to C, on A's account, the money which B owes A, must have been not uncommon; for if there was commerce, there was foreign indebtedness, and it must sometimes have happened that in this way a foreign debt could be paid with equal convenience to debtor and creditor. Indeed, both Cicero (*a*) and Isocrates (*b*) refer to such cases. Moreover, many of the principles of the civil law in relation to novation, delegation, and subrogation are quite analogous to those which now constitute the law of negotiable paper; and for this reason it may seem more strange that nations possessing so much commerce and civilization as Greece and Rome, did not go so far

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(*a*) Epist. ad Att., xii. 24, xv. 25.

(*b*) Τραπεζίτης. Isoc., p. 170 (17).

as to invent and use negotiable paper. But they did not. Bills of exchange, which at first were not, so far as our evidence extends, negotiable, were in use in Venice in 1272, for a law of that date refers to them. There are traces of them a little earlier; and the different theories which ascribe their origin — always on some, but never on certain evidence — to the Jews when oppressively expelled from their homes, to the Lombards when driven from one country to another for usury, or to the Guelphic Florentines when exiled from Italy by the Ghibellines, all concur in proving that they were in use among the commercial nations of Europe, and especially along the shores of the Mediterranean, about five centuries ago, and that they were then of recent introduction.(c)

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(c) Mr. Reddie, in his *Historical View of the Law of Maritime Commerce*, examines this question with his accustomed thoroughness and ability, and concludes that bills of exchange were first used by the Campsores or money-lenders at the fairs of the twelfth, thirteenth, and fourteenth centuries. He remarks as follows: "Along with the dealers in other merchandise, the money-dealer repaired with his commodity to the stated fairs established over Europe; and, as his commodity was in constant and universal demand, he became a person of consequence at the fair. As his money-table was necessary for the accommodation of all the other dealers, he had a peculiar claim to the protection of the government under whose authority the fair was held. Like the other merchants who disposed of their goods, he was equally if not more entitled to obtain a document of the debt contracted to him, under the seal of the fair, and clothed with all the privileges enjoyed by the creditor under its peculiar jurisdiction. For the money so advanced by him, it generally suited the merchant whom he accommodated to give or transfer to the money-dealer some of these documents of debt which he had received from other merchants for the goods he had brought to and sold at the fair. To the money-dealer this was also desirable, as affording a double security for the money he advanced and the credit he gave; and the document of debt thus transferred, for a certain sum advanced in cash by a money-dealer at a fair, specifying a particular day at a subsequent fair, to be kept either in the same or in a distant town, and under the peculiar jurisdiction of the fair, containing a warrant for arresting the person of the debtor who should fail in making payment, combines all the essentials, and obviously presents the model, of our modern bill of exchange. The precise era of that most useful invention does not appear to have been exactly ascertained; but that it originated, in the manner we have just seen, in the usages and customs observed and in the regulations adopted at fairs, from considerations of general security and convenience, there is every reason to believe. And after it was once established upon a small scale, the utility and convenience of the invention behooved gradually to lead to its more extensive adoption, particularly in foreign and maritime commerce. Indeed, it seems probable that bills of exchange, such, or nearly such, as we have at present, first came into general use in the course of the extended commerce carried on by the maritime cities of Italy, and of the south of France and Spain, under their comparatively free and well-administered governments. Weber, in his *Ricerche sull' Origine e sulla Natura del Contratto di Cambio*, published at Venice in 1810 states positively that

These facts have an interest far beyond that which may be felt only by the historian or antiquary. For if they help us to understand the reason why this most useful invention was made at that period, and was not made before, they may also assist

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such documents were in use at Venice in 1171; and a law of Venice of 1272 clearly designates bills of exchange. The unpublished statute of Avignon, of 1243, contains a paragraph entitled *De Litteris Cambii*; a statute of Marseilles, dated 1253, presents evident traces of them; and a transaction of this description is attested by a document of 1256, relative to England. Further, in his *Collección Diplomatica*, Don Antonio Capmany has discovered and recorded, in the middle of a public authentic instrument, the following copy of a bill of exchange, dated 28th April, 1404, drawn by a merchant in Bruges upon a mercantile company in Barcelona, which approaches pretty much to the present form, and shows that such negotiable documents were then in frequent use: 'Al nome di Dio, Amen. A di Aprile xxviii, 1404 Pagate per questa prima di camb. à usanza, à Pietro Gilberto e Pietro Olivo, scuti mille, a sold. x. Barcelonesi per scuto: e quali scuti mille sono per cambio che con Giovanni Colombo, a Gressi xxii. de gresso per scuto, et Pon. a nostro conto; et Christo vi guardi. (Subtus verò erat scriptum.) Antonio quart. Sab. di Brugis.' It seems idle, therefore, to look for the origin of these negotiable documents in any particular event, occurring in any particular country; as Montesquieu seems to have done in the expulsion of the Jews from France, in 1181, by Philip Augustus, according to the story first told, it is believed, by Cleirac, in his *Us et Coutumes de la Mer*. It is, no doubt, true, as observed by M. Nouguiér, the latest French writer on the subject (1839), that there is a distinction between the cause or occasion, and the fact or event, of the invention of bills of exchange; that if we inquire what cause has led to the invention, the true answer is, the necessities of commerce; but that if we inquire who were the inventors, in what position, and by whom, these necessities were most strongly felt, and what person or persons, experiencing the urgency of these necessities in the most lively manner, produced the thing invented, it would be absurd to call the extension of commerce the inventor; for this would be to confound the mover (*moteur*) with the agent. It is also highly probable that the Jews, being in these ages, as we have seen, the chief *campsores* or money-lenders, persecuted from mistaken religious views, and on account of their alleged pecuniary extortions, scattered over the European kingdoms, yet in a manner forced to keep up a pretty constant communication with each other, clever and acute naturally, and comparatively skilful in such business, from having been trained to it for generations, were really the first inventors of bills of exchange in a rude state. But that they made the discovery or invention at the precise time, and solely in consequence, of their expulsion from the kingdom of France by Philip Augustus, is not very likely in the circumstances, does not appear to be proved by any contemporary, or nearly contemporary, authority or document, or by any other authority than the statement of Cleirac, in 1661, made nearly five hundred years after the alleged event, and which seems to have been repeated by subsequent French writers without much further investigation."

Hume (*Hist. Eng.*, ch. 12) states, that in the year 1255 the Bishop of Hereford, being at Rome as deputy from the English Church, in order to replenish the Pope's exhausted treasury and pay the debt of Henry III., drew bills of different values, but amounting in all to 150,540 marks, on all the bishops and abbots of the kingdom; and granted these bills to Italian merchants. His authority is the *Historia Major* of Matthew Paris, pp. 612, 628 (edit. 1840, pp. 910, 911, 914), and the *Chron.* Thomæ Wykes (Vol.

us in comprehending the exact purpose which they were intended to accomplish, and the function they do in fact perform, and thus they will aid us in discovering the true principles of the law in relation to them; for these must necessarily be such as will promote that purpose and function.

The views which we entertain on this subject, and have briefly intimated elsewhere, are these. We consider that some exchange of commodities must have existed among men as soon as society existed; for one of the objects for which society was formed, and one of the influences which held it together, must have been the facility which it afforded its members to make their superfluities

ume 2 in Gale's *Historiæ Anglicanæ Scriptores Quinque*, Vol. 2). Wykes puts this transaction in the year 1260. But neither Wykes nor Paris warrants us in considering these bills as anything more than letters directing the payment of money "*tali et tali mercatori Senensi aut Florentino*." That given by Paris differs entirely, in form, from the old bills referred to by Capmany and Arnolde, and from bills now in use; but in nature and quality is perhaps the same, but not negotiable. Macpherson (*Annals of Commerce*, Vol. 1, p. 405), referring to the same occurrence, says: "Though the excellent accommodation of remitting money by bills of exchange was probably known long before this time in Italy and all other countries in which there was any commerce, there is not, I believe, any express mention of them (so little attention did historians pay to matters of real utility and importance) till a very extraordinary and infamous occasion connected them with the political events of the age."

In Anderson on Commerce, Vol. 1, p. 171, bills of exchange are said to be referred to by a charter of Hamburg in 1189, and to have been at that time "very new in Europe." In 1307 Edward I. prohibited the payment of tithes to the Pope in coin or bullion, but directed that the sums raised should be delivered to merchants in England, to be remitted to the Pope "*per viam cambii*." And by act of Parliament, in 1381, reciting the great mischief which the realm suffered because gold and silver, money, plate, jewels, &c. were carried out "so that, in effect, there is none thereof left," it is enacted that no moneys, plate, &c. should be sent beyond sea, and no payments, other than salaries to the king's officers, made, except by bills of exchange, upon the oath of the merchant exchanging, and at the special license of the king. Upon which the author observes: "This act too plainly shows how little the trade and nature of exchange by bills was then understood in England; though long before this time in familiar use in the free cities of Italy, in the Netherlands, Hamburg, &c. So inconsiderable then were our foreign commercial dealings." *Id.*, pp. 274, 373, 374.

Macpherson, in his *Annals of Commerce*, Vol. 1, p. 367, states as follows: "1202, January 6th. King John, having occasion to send two agents to Rome, where no business could be forwarded without money, furnished them with a letter addressed to *all merchants*, whereby he bound himself to repay the sums advanced to his agents, &c., at such time as should be agreed upon, to *any person* presenting his letter, together with the acknowledgment of his agents for the sum received by them." He is said to have repeatedly practised the same method, and an earlier instance is referred to. His authority is Prynne's *Hist. of King John*, pp. 5, 11.

The following legend, says Mr. Johnson (*Law of Bills of Ex.*, London, 1839) has

supply their wants. How long this state of things continued, or how long this interchange was effected by means of barter alone, we do not know, because, at the beginning of recorded history, we find money in use among men. This was a great step in advance. Something was found to represent all other things in this business of interchange. The articles originally used for this purpose were two metals, so generally found, and in such quantities, as to be sufficient for the purpose, and yet not found without an expenditure of time and labor which would prevent them from becoming too common, and would thus impart to them a sufficient value. And the experience of all subsequent ages has

with all gravity, been adduced to prove that bills of exchange were used in the fourth century: "The philosopher Synesius, afterwards Bishop of Ptolemais, about 410, having converted a pagan philosopher, Evagrius of Cyrene, to Christianity, the convert soon afterwards brought to Synesius three hundred pieces of gold for the poor, requesting a bill, under his hand, that Christ should repay it him in another world, with which Synesius complied; and not long after, Evagrius being about to die, he directed this bill to be deposited in his coffin. Soon after his death, he appeared in a vision to his friend the Bishop, and told him to come to his grave and take his bill, which upon Synesius doing, he found his bill in the hand of the corpse, with this receipt written upon it: 'I, Evagrius the philosopher, salute thee, most holy Bishop Synesius. I have received the debt which in this paper is written with thy own handwriting. I am satisfied, and have no lawful claim for the gold which I gave to thee, and by thee to Christ, our God and Saviour.' Good Richard Baxter, when commenting upon this marvellous story, which he evidently believed, very gravely remarks: 'If any be causelessly incredulous, there are surer arguments which we have ready at hand to convince him by.'"

The following form of bills in use about the year 1500 in England is taken by Mr. Johnson from the Chronicle of Richard Arnolde: "Be it knowen to all M<sup>r</sup>. y<sup>e</sup> I, R. A. Citezen and Habd<sup>r</sup>. of London, have ress<sup>d</sup>. by Exchange of N. A. Mercer of the same Cite XX. li. St.] whiche twenty Ponde St. to be payed to the sayd N. or to the Bringer of this Byll, in Synxten Marte next comyng, for VI. 's viij. d' st] IX. s. iiij. g. fl.] Money Currant in the sayd Marte; and yf ony defaut of payement be at the Day in alle or ony part y<sup>e</sup>rof, that I promyse to make good all Costes and scathes that may growe therby for defeaute of payement, and hereto I bynde me myn Executours and all my Goodis wheresoever they may be founde, in Wytnesse whereof I have written and sealyed this Byll, the X Day of Marche A<sup>d</sup> Dni. MCCCC. &c." Mention is made of "letteres d'eschange," in stat. 3 Rich. II. c. 3 (1379). The first reported case is *Martin v. Boure* (1 Jac. 1), Cro. Jac. 6.

See further upon this point, 3 Kent Com. 71, 72; Story on Bills, §§ 5 - 11; Chitty on Bills, pp. 10, 11; Glen on Bills, pp. 1 - 9; Pothier, *La Traite du Contrat de Change*, Partie 1, chap. 1; Montesquieu, *Spirit of Laws*, B. xxi. chap. 20; Molloy, *De Jure Marit. et Nav.*, B. 2, chap. 10; Anderson on Commerce, Vol. 1, pp. 204, 385, 411, 422; Macpherson's *Annals*, Vol. 1, pp. 399, 474, 571, 592, 602, 615; Hallam's *Intr. to Lit. of Europe*, Vol. 1, p. 68, note; Smith's *Wealth of Nations*, Vol. 1, p. 38.



proved that the selection was either very fortunate or very wise, for gold and silver have remained to this day the most universal and the most adequate representatives of all property. From the earliest intimations it may be inferred that these metals were first used as a medium of exchange, by weight ; but another step was taken at a period so remote that we have no certain knowledge of it, and then they were coined into money.

This instrument of commerce answered all the purposes for which it was wanted for many ages. It satisfied all the requirements of social life, and of commerce, through the early Eastern empires, and those of Greece and Rome. It is said, but upon somewhat doubtful authority, that some kind of paper-money was used in Tartary, or China, or Japan, a thousand years ago ; but nothing is known certainly about this.(d) In Europe, gold and silver money were the only circulating medium, and were sufficient ; but five or six hundred years ago the discovery was made of a new circulating medium, of which it is the characteristic quality, that it represents that which represents everything else.

The use of money enlarged human intercourse, or so much of it as may be included in the widest sense of the word commerce. It made interchanges possible and easy, which would otherwise have been very difficult, if not impossible. We cannot imagine, for example, the whole commerce of Greece and Rome, or a hundredth part of it, carried on by actual barter of commodities. Precisely in the same way, the invention and use of paper to represent money gave a new enlargement to commercial intercourse, and greatly increased its facilities and its possibilities. For we could not now suppose the commercial intercourse between America and Europe, for example, to be carried on wholly by actual exchange of the precious metals, — as must be the case if bills and notes were abandoned, — without a cost and hindrance which would be fatal to a very large part of it.

The invention and use of money conferred upon mankind the vast benefits which have ever flowed therefrom, because money represented all other commodities, and for no other reason whatever. He who had any superfluities on hand was no longer obliged to take the trouble of storing them and the risk of their

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(d) 4 Mod. Univers. Hist. 499.

destruction, or to save them by exchanging them for the superfluities of some accessible neighbor, whether these were precisely what he wanted or not. For now he might *sell* his superfluities, and their value was then invested in something easily preserved, and which could always be exchanged for the very article he wanted, as soon as he found it within his reach. But after a time, this exchange was to be made in such quantities, and at such distances, that it cost too much in time and trouble to be profitable; and here is a natural limit to commerce by mere money, which seems to have been reached by the nations of Europe some few centuries ago. Beyond this, therefore, it is plain that commerce could not have grown, unless new facilities, by means of new instruments, had been provided for it; and this was done by the invention and use of bills of exchange. Just as, by the help of money, a hundred oxen could be exchanged for a hundred pieces of cloth, at distances which would have made the actual transfer of the oxen and the cloth too onerous to be advantageous, so now, commercial transactions which would have required large bags or boxes of money to be sent back and forth at great cost, both of time and money, and with much trouble and some hazard, can be carried into full effect, with equal promptitude, safety, and facility, by exchanging small pieces of paper. And these two inventions, one made at the beginning of human society, and the other but a few centuries since, are useful for precisely the same reason; money represents all commodities, and so prevents the necessity of an actual exchange of commodities; and bills and notes represent money, and so prevent the necessity of an actual transfer of money.

Moreover, as gold and silver were first used by weight, and it was a distinct though very speedy improvement to coin them into money, so bills of exchange were first used only for the benefit of a specified payee, but were soon perfected into the indispensable instrument of commerce which they now are by being made negotiable. For this adds an entirely new element to their utility. By means of indorsements, which may be extended indefinitely, negotiable paper not merely makes money in one place or at one time become money in another place or at another time, without actual transfer, and not merely makes credit the equivalent of money, but it represents and carries with it the accumulated credit of all who become parties to the paper.

We have thus stated at some length our views of the *purpose*, or as it might be called, in technical phrase, the final cause, of the invention and use of negotiable paper in the forms in which it is now commonly employed, because we believe that we reach, in this way, the foundation on which all the principles of law peculiar to negotiable paper finally rest. For the law exists for the sake of those interests which it defines and guards, and is adequate to its object or otherwise, exactly in the proportion in which it actually subserves or hinders the purposes of those institutions or usages for which it lays down the rules. In the present instance, the law of negotiable paper is what it should be, in the degree in which it causes or permits negotiable paper to become that exact representative of money, which such paper was invented and is used for. And we shall be able to see, with great clearness, that the principles of this law are very accurately adapted to this end.<sup>(e)</sup>

We shall find it useful to look at this end and purpose, when we are seeking to determine what are, and what are not, the true principles of this law. And, perhaps, if we find rules still in force, or held by one court or another, which cannot be regarded as well adapted to carry out this representation of money by paper, and make it secure, safe, and effectual, we

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(e) The most striking characteristic of *money*, as distinguished from other species of property, is the facility and freedom with which it *circulates*. By means of the stamp, its precise value is ascertained by mere inspection; and, by a rule of law, which we shall notice hereafter, the possession of the bearer is conclusive evidence of title, for the protection of those who deal with him in good faith. Any one taking it, therefore, in the course of business, need look no further than to the face of the coin and the possession of the person from whom he receives it. These are qualities which every representative of money must possess in order to answer its purpose effectually; and we shall see that negotiable paper does possess them in an eminent degree. In *Gibson v. Minet*, 1 H. Bl. 606, *Eyre, C. B.* said: "Everything which is necessary to be known, in order that it may be seen whether a writing is a bill of exchange, and as such by the custom of merchants partakes of the nature of a specialty, and creates a debt or duty by its own proper force, whether by the same custom it be assignable, and how it shall be assigned, and whether it has in fact been assigned agreeable to the custom, appears at once by the bare inspection of the writing; with the circumstance, in the case of a bill payable to bearer, of that bill being in the possession of him who claims title to it. The wit of man cannot devise a thing better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it."

may be able to discover that these rules have been brought from the common law, where their use and purpose were very different, and have not yet been moulded either by usage or adjudication, that is, either by merchants or by courts, into a suitable conformity with the nature and objects of this peculiar class of mercantile contracts.

It is quite important to remember, that it is this element of *negotiability* which makes a contract founded upon paper thus adapted for circulation different in many important particulars from other contracts known to the common law. For this very characteristic quality of negotiability was itself unknown to the common law. A simple promissory note, or, in other words, a written promise to pay money, must have been in use among men almost as long as the art of writing. Indeed, references to just such an instrument as this are found in the civil law.<sup>(f)</sup> But when negotiable promissory notes were first used, and when they were first recognized, with all the negotiable qualities which now belong to them, by the law of England, are questions of considerable difficulty. In 1704, a statute of Queen Anne <sup>(g)</sup> enacted, "That all notes in writing that shall be made and signed by any person, &c., whereby such person, &c. shall promise to pay to any other person, &c., his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, &c. to whom the same is made payable; and also every such note payable to any person, &c., his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person, &c. to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, &c. who signed the same; and that any person, &c. to whom such note that is payable to any person, &c., his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her,

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(f) Dig. lib. 22, tit. 1, 41, § 2; Dig. lib. 2, tit. 14, 47.

(g) 3 and 4 Anne, c. 9.

or their action for such sum of money, either against the person, &c. who signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange."

The preamble of this statute recites as the cause of it, that promissory notes had been held not negotiable. This doctrine is generally ascribed to Lord *Holt*, who is considered as urging it with much pertinacity, against the wishes and opinions of his reluctant brethren. But it seems as if he held a promissory note payable to order to be non-negotiable in form, but not in substance; for he says, in the case of *Buller v. Crips*,<sup>(h)</sup> which was determined in 1702, and to which the Parliament probably referred especially: "If the indorsee had brought this action against the indorser, it might peradventure lie; for the indorsement may be said to be tantamount to the drawing of a new bill for so much as the note is for upon the person that gave the note." And certainly the indorsee then would not claim as assignee of the note, but as indorsee under the law merchant. Nor can it be said that the statute of Anne, by the words in the preamble, "it hath been held," &c., affirms this to have been the law; but the better construction may be, that the Parliament thought the court mistaken, and hastened to prevent their erroneous decision from becoming law, by their controlling statute. This view is, perhaps, supported by the language used in respect to Lord *Holt's* ruling on this point; thus, in *Grant v. Vaughan*,<sup>(i)</sup> Sir *F. Norton* and Mr. *Dunning*, on behalf of the plaintiff, remarked, that he was "peevish"; and Lord *Mansfield* said, "Lord *Holt* got into a dispute with the city about it"; by the city, meaning the merchants of London. In the same case,<sup>(j)</sup> Lord *Mansfield* spoke of the "first struggle of the merchants," which "made *Holt* so angry with them," and though he thinks the merchants were in the wrong, he says the reasons given by the judges "are equally ill-founded." This question may have some importance; because it is in fact the question, What were notes of this kind, by

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(h) 6 Mod. 29. This action was by an indorsee of a promissory note against the maker; and Lord *Holt* was of opinion that the action would not lie, but no judgment was given.

(i) 3 Burr. 1520.

(j) 1 W. Bl. 485, 487.

the law of England, before the statute of Anne? And this question is again the question, What is the law in respect to them in those of our States in which the statute of Anne is not in force? It is true that in most, or perhaps all, of these States, other statutory provisions, or a course of adjudication, have placed these notes on a somewhat similar ground with that which they occupy by the statute of Anne; but not, perhaps, so as to render quite unimportant the question, What was the law before this statute? We have not space to examine this question at length, and upon the authorities, but will content ourselves with saying, that we incline to hold, first, that foreign negotiable bills were in use and were known to the law long before negotiable notes were known; (*k*) and, second, that inland negotiable bills were in use before negotiable notes, which, however, is not quite certain; (*l*) third, that inland bills and notes were confounded together in the use of them by merchants, and were considered as the same

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(*k*) It is certain that foreign bills of exchange were known to the courts as early as the reign of Elizabeth, for there are extant precedents of declarations upon them of that period. See Rastell's Entries, 10 a, 338 a. The earliest reported case in which they are mentioned is *Martin v. Boure* (1 Jac. 1), Cro. Jac. 6.

(*l*) In *Bromwich v. Loyd*, 2 Lutw. 1585, *Treby*, C. J. said: "Bills of exchange at first were extended only to merchant strangers trafficking with English merchants, and afterwards to inland bills between merchants trafficking one with another here in England, and then to all persons trafficking and negotiating, and recently to all persons, whether trafficking or not." The better opinion is, that inland bills of exchange came into use about the middle of the seventeenth century. The earliest case in the books, which appears clearly to have been upon an inland bill, is *Chat v. Edgar*, 1 Keb. 656 (1663). In that case, a butcher, having bought cattle of the plaintiff, who was a grazier in Norfolk, came to the defendant, who was a parson, and desired him (as he had money in London) to draw a bill on J. S. in London, in whose hands it was, payable to the plaintiff, and that he would repay the parson in the country. The parson drew the bill, with private advice to J. S. not to pay the plaintiff till he, the parson, had received the money of the butcher, who broke and became insolvent; and so, on default of payment by J. S., the plaintiff brought his action against the parson, as drawer of the bill. No objection appears to have been made on the ground that the bill was inland. In *Buller v. Crips*, 6 Mod. 29 (1702), *Holt*, C. J. said: "I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol; and it was an action against the acceptor; the defendant's counsel would put them to prove the custom; at which, *Hale*, C. J., who tried it, laughed, and said they had a hopeful case of it. And in my Lord *North's* time it was said, that the custom in that case was part of the common law of England; and these actions since became frequent, as the trade of the nation did increase; and all the difference between foreign bills and inland bills is, that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest."



thing, both by them and by some of the courts; (m) fourth, that these notes, although not always discriminated by name from bills of exchange, were certainly in common use before that statute, as may be inferred from the insisting of the merchants

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(m) For this reason it is impossible to trace the history of promissory notes, prior to the statute of Anne, with any great degree of accuracy. In *Grant v. Vaughan*, 3 Burr. 1525, Lord *Mansfield* said: "Upon looking into the reports of the cases on this head, in the times of King William the Third and Queen Anne, it is difficult to discover by them when the question arises upon a *bill*, and when upon a *note*; for the reporters do not express themselves with sufficient precision, but use the words '*note*' and '*bill*' promiscuously." The truth probably is, that the term *promissory note* was not much in use prior to the statute of Anne. In Lord *Holt's* time, the question was, not whether the instruments which are now known as promissory notes were negotiable, as distinct and different instruments from bills of exchange, but whether they were bills of exchange. This sufficiently appears from the cases of that period. Thus, in *Clerke v. Martin*, 2 Ld. Raym. 757, the plaintiff counted upon the custom of merchants, as upon a bill of exchange; and showed that the defendant gave a note, subscribed by himself, by which he promised to pay — to the plaintiff or his order. A verdict having been given for plaintiff, it was moved, in arrest of judgment, that this note was not a bill of exchange within the custom of merchants, and therefore the plaintiff, having declared upon it as such, was wrong. It was argued by *Shower*, for the plaintiff, that this note, being payable to the plaintiff or his order, was a bill of exchange, inasmuch as by its nature it was negotiable; that there was no difference in reason between a note which saith, "I promise to pay to J. S. or order," &c., and a note which saith, "I pray you to pay to J. S. or order," &c.; they were both equally negotiable; and to make such a note a bill of exchange could be no wrong to the defendant. "But *Holt*, C. J. was *totis viribus* against the action; and said that this note could not be a bill of exchange. That the maintaining of these actions upon such notes were innovations upon the rules of the common law; and that it amounted to the setting up a new sort of specialty unknown to the common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method, as to declare upon a general *indebitatus assumpsit* for money lent," &c. And see *Potter v. Pearson*, 2 Ld. Raym. 759; *Burton v. Souther*, 2 Ld. Raym. 774; *Williams v. Cutting*, 2 Ld. Raym. 825, 7 Mod. 154. *Buller v. Crips*, 6 Mod. 29, was an action upon a note by the indorsee against the maker; and the plaintiff declared upon the custom of merchants as upon a bill of exchange. Upon a motion in arrest of judgment, *Holt*, C. J. said: "The notes in question are only an invention of THE GOLDSMITHS in *Lombard Street*, who had a mind to make a law to bind all those that did deal with them; and sure to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty; and besides, it would empower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of bills of exchange; for the reason of the custom of bills of exchange is for the expedition of trade and its safety; and likewise it hinders the exportation of money out of the realm." At another day he said, "that he had desired to speak with two of the most famous

on the great mischief which would result from the denial of their negotiability, they telling Lord *Holt* "that it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years"; (n) and fifth, that these notes were, therefore, at the time the statute was made, negotiable by the law merchant of England, which was and is as much a part of the law of England as — to use the strong language of Christian — the laws relating to marriage or murder.(o)

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merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; and that they had told him it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years, and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange."

(n) See preceding note.

(o) 1 Bl. Com. 75, n. This question is fully considered in 1 Cranch, 367, Appendix, n. A, in a learned note by the reporter. And see *Irvin v. Maury*, 1 Misso. 194; *Dunn v. Adams*, 1 Ala. 527, where it was held that promissory notes were negotiable, independently of the statute of Anne.



## CHAPTER II.

### OF PROMISSORY NOTES.

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#### SECTION I.

##### DEFINITIONS.

A PROMISSORY note is, in its simplest form, only a written promise. Almost always, however, it is a promise to pay money. He who promises signs the note; and the promise is made to a specified promisee, or to him or his order, or to the promisor or his order, or to bearer or holder.

The promisor is considered as making the note, and is called the maker. The promisee is called the payee. Where the promise is to pay to a specified payee, without further words, the note is not negotiable. Such a promissory note is little more than evidence of indebtedness, although there are some rules of law which are peculiar to this instrument. These we will consider hereafter. At present, we speak particularly of a note made payable to order; it may be to the promisor or order, (*p*) to the promisee or order, to the order of the promisor, or to the order of the promisee; (*q*) in either case, and equally, it is a *negotiable note*.

The word "negotiable," from the Latin word "negotium,"

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(*p*) See *post*, p. 18, note *v*.

(*q*) It seems to have been once a matter of doubt whether a note payable to the "order of A. B." was entirely equivalent to one payable to "A. B. or his order," it being objected that in the former case no one but an indorsee of A. B. could sue upon the note, and that A. B. himself could not, at least without indorsing it to himself. But it was long since settled, that a bill or note payable to a man and his order, or to his order only, is one and the same. See *Fisher v. Pomfret*, 12 Mod. 125; — *v. Ormston*, 10 Mod. 286; *Frederick v. Cotton*, 2 Show. 8; *Smith v. M'Clure*, 5 East, 476. In this last case Lord *Ellenborough* said: "A bill payable to a man's own order was payable to himself, if he did not order it to be paid to any other." And see *Sherman v. Goble*, 4 Conn. 246; *Huling v. Hugg*, 1 Watts & S. 412.

which is adequately translated by "business," is given to notes of this description, because they derive from this word "order" the capacity of entering into commercial business as an instrument of the greatest importance. By far the greater part of the business of this country is done by means of them. The reason why, by the use of this word, they become this instrument, is, that if A promises to pay B, no one but A and B are parties to this contract; no one else can become a party to it, so as to enforce it in his own name, in the same way, and with the same effect, as if he had been an original party. A note which is not to order, or not negotiable, can be transferred, and the new owner collect it in a certain way and under certain circumstances, which will be hereafter considered. But if the note be payable to order, it is a very different instrument. Then, A promises not merely to pay B, but either B, or, at B's election, such other person as B may order A to pay the note to. Therefore, when B orders A to pay the note to C, it follows that C may claim payment as if the note had been originally payable to himself, or, in other words, C stands fully in the place of B. And if B orders A to pay the note to C or his order, then C has the same power of substituting another that B originally had, and this substitute may have the same power, and this indefinitely. This order is regularly made by writing on the back of the note; or, in the language of the law merchant, by indorsement.

It was once questioned whether the negotiability of a note, created by the use of the words "or order," was not exhausted by the first order given; that is, by the first indorsement. It is now, however, well settled, that these words give to a bill or note a permanent negotiability, so that an indorsement gives to any indorsee the right of further indorsement, and the same to his indorsee, and so on, indefinitely; and therefore these words "or order" never need to be repeated in the indorsement.(r)

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(r) This was first decided in *More v. Manning*, 1 Comyns, 311. That was an action of assumpsit upon a promissory note, made by the defendant, and payable to one *Statham* and order; *Statham* assigned it to *Witherhead*, and *Witherhead* to the plaintiff; and upon a demurrer to the declaration an exception was taken, because the assignment was made to *Witherhead*, without saying *to him and order*, and then he could not assign it over; for by this means *Statham*, who had assigned the note to *Witherhead*, without subjecting himself to his order, would be made liable to be sued by any subsequent indorsee. "And to this the chief justice at first inclined, but afterwards it was re-

It has even been doubted whether an indorser can, by a restrictive indorsement, limit or prevent indorsement by the indorsee.(s) It is, however, now quite clear, that indorsements may be made restrictive, in any way that the indorser pleases, by the

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solved by the whole court that it was good. For if the original bill was assignable, (as it will be if it be payable to one and his order,) then he to whomsoever it is assigned has all the interest in the bill, and may assign it as he pleases." A few years later, in *Acheson v. Fountain*, 1 Stra. 557, it appeared that the plaintiff had declared upon an indorsement made by *William Abercrombie*, whereby he appointed the payment to be to *Louisa Acheson* or order; and upon producing the bill in evidence, it appeared to be payable to *Abercrombie*, or order; but the indorsement was only in these words, "Pray pay the contents to *Louisa Acheson*"; and therefore it was objected that the indorsement, not being to order, did not agree with the plaintiff's declaration. "But upon consideration, the whole court were of opinion it was well enough, that being the legal import of the indorsement, and that the plaintiff might upon this have indorsed it over to another, which would be the proper order of the first indorser." But the question was not set at rest until the case of *Edie v. East India Co.*, 2 Burr. 1216. That was an action upon a foreign bill of exchange, drawn upon and accepted by the defendant. The bill was payable to one Campbell or order, and was indorsed by him to one Ogilby, and by Ogilby to the plaintiff. The indorsement to Ogilby was without the words "*or order*"; and it would seem from the case that it was made to him as the agent or servant of Campbell, and without consideration. After the indorsement to the plaintiff, Ogilby became insolvent, and the question was, whether the plaintiff or Campbell should bear the loss. Upon the trial, Lord *Mansfield* permitted the defendant to put in evidence as to the usage of merchants. Whereupon the cashier of the Bank of England testified, "that the bank, if they ever discounted the bills not indorsed to order, did it only upon the credit of the indorser; but that otherwise they would not take them, not considering them as being negotiable." Another witness testified that an indorsement without these words was *restrictive* to the particular person specified in the indorsement, and was merely in the nature of a *personal authority* to receive the money. On the other hand, a notary-public, called by the plaintiff, testified, that a bill was "negotiable, notwithstanding the omission of these words, and that no objection of this sort was ever made. Indeed, if the bill should be indorsed, 'Pay the contents to A. B. *only*,' it was looked upon to be a restriction of the payment to A. B. *personally*." His Lordship instructed the jury, that, by the general law, (laying the usage out of the case,) the indorsement would follow the nature of the original bill, and be an absolute assignment to the indorsee or his order; but upon the evidence of usage, he left the question to the jury, who found a verdict for the defendant. Upon a motion for a new trial, the whole court held that the evidence of usage ought not to have been received, because the law was settled by the two cases cited above. And upon the merits of the question, Lord *Mansfield* said: "A draught drawn upon one person, directing him to pay money to another *or order*, is, in its original creation, not an authority, but a bill of exchange, and is negotiable. It belongs to the payee, to do what he thinks proper with it, and to use it as best suits his convenience. It is his *property*: and he may assign it as such, and to whom he pleases; and his direction 'to pay it to such a one,' is a direction 'to pay it to him or his order'; for he assigns his whole property in it, and has had a valuable consideration for so doing."

(s) Thus, in *Edie v. East India Co.*, 2 Burr. 1216, 1226, *Wilmot*, J. said: "There is a great deal of difference between giving a naked authority to receive it and transfer-

use of express and definite terms.<sup>(t)</sup> We shall consider this question more fully hereafter, when treating of indorsement.

If the note be made by A and be payable to A's own order, there is then no payee or promisee, until A orders himself, by an indorsement in blank, or by a special indorsement to pay the note to B or C or some one else; then the person to whom payment of the note is thus ordered to be made becomes the payee or promisee, in like manner as if his name had been originally inserted. Such a note indorsed in blank is equivalent to a note payable to bearer.<sup>(u)</sup> If a bill be drawn on the drawer, payable to the drawer or order, the drawer may accept it, and indorse it, and thus hold all these relations to an indorsee. We apprehend that bills are seldom so drawn, but notes are very frequently made payable to the maker's own order, and indorsed by him. Indeed, in some of our larger cities, the majority of notes given for goods are made in this way. The reason is obvious. One who receives such a note may sell it, or offer it for discount, without adding his own name so as to be liable as an indorser; and without adding his name together with the words "without recourse," or any other which would cast suspicion. For a similar reason, if a merchant in large business caused only the feeble notes which he took to be indorsed by the maker, and so made transferable without his own indorsement, this again would impair their credit. If therefore he wishes, for the reasons above

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ring it over by indorsement. And I doubt whether he can limit his indorsement of it by way of assignment, or transfer to another, so as to preclude his assignee from assigning it over as a thing negotiable. For the assignee purchases it for a valuable consideration, and therefore purchases it with all its privileges, qualities, and advantages, one of which is its negotiability. To be sure, he may give a mere naked authority to a person to receive it for him; he may write upon it, 'Pray pay the money to my servant for my use'; or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him and for his own use. In such case, it would be clear that no valuable consideration had been paid him. But, at least, that intention must appear upon the face of the indorsement. Whereas here no such thing, nor anything tending to it, appears upon the face of the indorsement; it is a general assignment without any restriction at all." And see, *per Tindal*, C. J., in *Cunliffe v. Whitehead*, 3 Bing. N. C. 828; *Gay v. Lander*, 6 C. B. 336; *Rice v. Stearns*, 3 Mass. 225. As if the payee indorse, "Pay the contents of the within to C. D. only."

(t) See *Sigourney v. Lloyd*, 8 B. & C. 622, 3 Man. & R. 58, 5 Bing. 525; *Treuttel v. Barandon*, 8 Taunt. 100; *Snee v. Prescott*, 1 Atk. 245; *Anchor v. Bank of England*, 1 Doug. 637.

(u) *Hooper v. Williams*, 2 Exch. 13.

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stated, or any other, to have his notes in this form, he would make it a rule to have all his notes so made. Then he could indorse what notes he chose to, and not injure any by withholding his indorsement.(v)

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(v) Notes of this kind are now common in England as well as in this country. At what precise time they first came into use, and what was the occasion which gave rise to them, it is impossible to say. Baron *Parke*, in *Hooper v. Williams*, 2 Exch. 21, characterizes them as "securities in this informal, not to say absurd form, probably introduced long after the statute of Anne, — for what good reason no one can tell, — and become of late years exceedingly common." So Chief Justice *Wilde*, in *Brown v. De Winton*, 6 C. B. 342, said that notes in this form, according to his experience, which extended over a period exceeding forty years, were very far from uncommon. They seem not to have attracted the attention of courts until a recent date. It has always been the received opinion in this country, that instruments in this form were negotiable within the statute of Anne, and that they differed in no material particular from notes in the ordinary form. Such also, according to the observation of eminent counsel in *Brown v. De Winton*, was the received opinion in England until the case of *Flight v. Maclean*, 16 M. & W. 51. Since that case, the nature and construction of instruments of this kind have been very learnedly and elaborately discussed by the three principal common law courts in Westminster Hall. The case of *Flight v. Maclean* came up in the Court of Exchequer in 1846. The declaration stated that the defendant made his promissory note in writing, and thereby promised to pay to the order of the defendant £500 two months after date, and that the defendant then indorsed the same to the plaintiff. To this there was a special demurrer, assigning for cause, that it was uncertain whether the plaintiff meant to charge the defendant as maker or as indorser of the note, and that a note payable to a man's own order was not a legal instrument, and could not be negotiated. The court sustained the demurrer without much discussion, "on the ground that the instrument in question, made payable to the maker's order, was not a promissory note within the statute of Anne, which requires that a promissory note, to be assignable, shall be made payable by the party making it to some 'other person,' or his order, or unto bearer." During the argument, however, *Parke*, B. put to the counsel this question: "Though by the law merchant the note cannot be indorsed, could not the defendant make this a promissory note by indorsing it to another person?" This case was followed the next year in the Queen's Bench by the case of *Wood v. Mytton*, 10 Q. B. 805, in which precisely the same question was presented as in *Flight v. Maclean*, except that in the latter it arose on a motion in arrest of judgment, whereas in the former it arose on a special demurrer. The question was argued at considerable length, and Lord *Denman*, after a very minute examination of the statute of Anne, held that the instrument declared on was a promissory note within the terms of the statute, and judgment was given for the plaintiff. It is to be observed, however, that *Patteson*, J., during the argument of this case, put to the counsel a question similar to that put by Baron *Parke* in *Flight v. Maclean*. "Whatever," said he, "may be the case with respect to a note like this before indorsement, may it not, as soon as it is indorsed, come within the statute, either as a note payable to bearer, if it is indorsed in blank, or as a note payable to the person designated, if it is indorsed in full?" In 1848 the question came up again in the Court of Exchequer, in the case of *Hooper v. Williams*, 2 Exch. 13. The instrument declared on in this case was similar to those in the two former cases, being made payable to the defendant's own order, and by him indorsed in blank. The

If the note be payable to bearer or holder, then the promise is made to any and every person who obtains possession of the note, and presents it for payment. This note also is negotiable; but in a somewhat different sense, and under a somewhat different

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pleader, however, adopting the suggestion of Mr. Baron *Parke* and Mr. Justice *Patteson*, declared as upon a note payable to bearer. At the trial the defendant objected that there was a variance between the note and the declaration, and the case coming before the court in banc upon this objection, *Parke*, B., in delivering the opinion of the court, said: "In *Flight v. Maclean*, this court held, *on special demurrer* to the first count of a declaration stating a note payable to the order of the maker, and indorsed to the plaintiff, that the count was bad, such a note not being within the statute of Anne. The case of *Wood v. Mytton* afterwards came on in the Queen's Bench. It was an action on a similar note indorsed to the plaintiff. After verdict for the plaintiff, a motion was made in arrest of judgment; and the court discharged the rule, holding, after a minute examination of all the provisions of the statute of Anne, that such a note was within that statute, and assignable by indorsement. Though these decisions are not at variance, as will be afterwards explained, the construction of the statute by the two courts differs. After a careful perusal of the statute, we must say that we do not think that it ever contemplated the case of notes payable to the maker's order, which are incomplete instruments, and have no binding effect on any one till indorsed. The Court of Queen's Bench thought, that, though the first part of the first section of the statute of Anne applied only to notes payable to *another* person or his order, or to bearer, which notes it makes obligatory between the parties; yet that the second part applies to every note payable to *any* person, and therefore includes a note payable to the maker or his order. It appears to us that this is not the meaning of this part of the section, which is, as we think, intended to make those instruments, to which it had previously given an obligatory effect between the original parties, transferable to third persons, so as to enable them to sue upon them as upon the transfer of bills of exchange. The previous part of the section had given to the payee, when the note was made payable to another person, or to another person or order, and to the bearer, whoever at any time he might be, a right to sue; thus providing entirely for notes payable to bearer, whether in the hands of the original or a subsequent bearer. And then the section proceeds to make the class of notes payable to a person or order transferable. We think that the legislature, by the second part of the section, could only mean to make that instrument which gave a right to *sue* assignable; and no right to sue could exist in any one, in the case of a note payable to the maker's order, until the order was made in the shape of an indorsement; until that indorsement was made, it was an imperfect instrument, and, in truth, not a promissory note at all, and consequently not transferable under the statute. What, then, is the effect of the indorsement to another person? We think it was to perfect the incomplete instrument, so that the original writing and indorsement taken together became a binding contract, though an informal one, between the maker and the indorsee, and then, and not till then, it became an assignable note. It is well settled, that no particular form of words is necessary to constitute a promissory note. If a man draws an instrument in the form of a bill of exchange on himself, and accepts it, it is a promissory note. If he says, 'I pay to A. B. £ 100,' and adds an address to the instrument, it may be declared on as a note. What, then, is the meaning of the instrument in question? Before the indorsement it may be considered to be a promise to pay £ 150 two months after date to the person to whom the maker should afterwards, by indorsement, order the amount to be paid, such



system of rules from those notes which are payable to some specific promisee or order. We shall speak of them more particularly hereafter.

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indorsement being intended to have the same operation as if put on a complete note. If, then, the indorsement should be to a particular person, or to A. B. or his order, it would be a note payable to that person, or to A. B. or his order; and if in blank it would be payable to bearer, in like manner as a sum secured by a complete note would have been by similar indorsements. It may follow as a consequence, that the holder might fill up the blank indorsement by writing over it his own name, and so make it payable to himself, although it is not necessary to determine that point; and, reading the note as payable to bearer, any one may afterwards indorse his own name, and so make himself liable to subsequent holders, as the indorser of a complete note payable to bearer would do. It appears to us, then, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration. This view of the case reconciles the decision of this court in *Flight v. Maclean* with that of the Queen's Bench in *Wood v. Mytton*; but not the reasons given for those decisions. In the case in this court the declaration was bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was, in substance, good; for it set out an inartificial contract, which had the legal effect of a valid note, payable, as stated on the record, to the plaintiff. The difference between the two courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd, form are still not invalid; and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the statute of Anne, and for what good reason no one can tell, has become, of late years, exceedingly common; and it is obvious, that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them." Shortly after the decision of this case, the same question came up in the Common Bench, in the cases of *Brown v. De Winton*, and *Gay v. Lander*, 6 C. B. 336. In *Brown v. De Winton*, the question came up in the same shape as in *Wood v. Mytton*, and *Coltman, J.*, in giving the judgment of the court, delivered a very able and elaborate opinion, in which he agreed entirely with the view taken by the Court of Exchequer. In *Gay v. Lander* the question was presented in a little different light. We have already seen that, when a note is made payable to A. B. or his order, the words "his order" impart to the note a permanently assignable quality, into whose hands soever it may come; so that, though A. B. indorse the note to C. D. specially, without using the words "or his order," yet C. D. may indorse it in turn to whomsoever he pleases. The point raised in *Gay v. Lander* was, whether the indorsement should receive the same construction in the case of a note payable to the order of the maker and by him indorsed, and the court held that it should. *Coltman, J.*, in delivering the opinion, said: "We think that the principle on which the case of *Brown v. De Winton* was decided will extend to this case. The principle on which that case was decided is, that the note, before it was indorsed, was in the nature of a promise to pay to the person to whom the maker should afterwards, by indorsement, order the amount to be paid; and that, after the note is indorsed and circulated, it must be taken, as against the party so making and indorsing the note, that he intended that his indorsement should have the same effect as an indorsement by the payee of a note payable to the order of a person other than the maker would have had. Now it is well established that, if a note be made payable to J. S. or order, and

## SECTION II.

## OF THE FORM OF PROMISSORY NOTES.

MR. CHITTY says that the usual form of a promissory note in England is: "£ 50 (or other proper sum). London (or other place), 1st January, 1840 (or other proper date). Two months after date (or at any other specified time, or on demand), I promise to pay to Mr. A. B. or order, fifty pounds, for value received. (Signed) C D."(*w*) In America a common form is: "New York, January 1, 1854. Value received, I promise to pay A. B. or order, one thousand dollars in four months. C. D." But as no special form is necessary in law, (*x*) so no one prevails in practice to the exclusion of others. The collocation of the words varies, the "value received" being often at the end; and sometimes the promise is directly to the payee, as "I promise A. B. to pay him or his order"; and frequently the words "from" or "after" "date" are added to the time of payment, although, when not added, they are of course implied.

Firms doing much business frequently have note-books printed, like check-books, with a margin, on which a memorandum of the number, date, parties, and amount may be entered for future reference and identification. It is usual in such printed forms to leave the date, parties, and amount in blank; but everything may be printed but the signature. That must be in writing. It has been held, incautiously we think, that an indorsement may be written and signed in pencil only; (*y*)

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J. S., in such case, indorses the note specially to Smith & Co., without adding 'or order,' Smith & Co. may convey a good title to any other person by indorsement." It may, perhaps, be inferred from what fell from Baron *Parke* in *Hooper v. Williams*, that he entertained a different opinion on this last point, but the point did not arise in that case, and probably his attention was not particularly directed to it. See *Muldrow v. Caldwell*, 7 Misso. 563; *Lea v. Branch Bank*, 8 Port. Ala. 119 *Scull v. Edwards*, 8 Eng. 24; *Blackman v. Green*, 24 Vt. 17; *Little v. Rogers*, 1 Met. 108; *Potter v. Tyler*, 2 Met. 58.

(*w*) Chitty on Bills (9th ed.), 516.

(*x*) *Morris v. Lee*, 1 Stra. 629, 2 Ld. Raym. 1396, 8 Mod. 362; *Brooks v. Elkins*, 2 M. & W. 74; *Wheatley v. Williams*, 1 M. & W. 533.

(*y*) *Geary v. Physic*, 5 B. & C. 234. This was assumpsit on a promissory note by an indorsee against the maker. It appeared that the indorsement was in pencil; and it was contended by the counsel for the defendant, that this was not such an indorsement as the law and custom of merchants required, citing *Co. Litt. 229 a*, where Lord *Coke*,



and this for reasons which would apply as well to the note itself. We are, however, inclined to think that better reasons might be drawn from the nature and purpose of negotiable promissory notes, for requiring that they should be written and indorsed in a way less open to fraud and uncertainty than in pencil. Perhaps a distinction should be made between a *negotiable* promissory note, which should in every respect be capable of becoming a trustworthy and efficient instrument of business, and a note

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speaking of a deed, says: "Here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a stone, or the like, &c., and the same be sealed or delivered, yet is it no deed, for a deed must be written, either in parchment or paper, as before is said, for the writing upon these is the least subject to alteration or corruption." But the court held the indorsement good. And *Abbott*, C. J. said: "There is no authority for saying, that, where the law requires a contract to be in writing, that writing must be in ink. The passage cited from Lord Coke shows that a deed must be written on paper or parchment, but it does not show that it must be written in ink. That being so, I am of opinion that an indorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent its being generally adopted. There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an indorsement of bills of exchange should be in writing, without specifying the manner in which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff." *Bayley*, J.: "I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials."

The same point was decided in *Closson v. Stearns*, 4 Vt. 11; *Reed v. Rark*, 14 Texas, 329; *Brown v. Butchers', &c. Bank*, 6 Hill, 443; *Partridge v. Davis*, 20 Vt. 499, 503. Testamentary instruments in pencil have frequently been admitted to probate. See *Rymes v. Clarkson*, 1 Phillim. 22; *Green v. Skipworth*, 1 Phillim. 53; *Dickenson v. Dickenson*, 2 Phillim. 173. So it has been held that a memorandum in pencil is sufficient to satisfy the Statute of Frauds. *Merritt v. Clason*, 12 Johns. 102, s. c. *nom. Clason v. Bailey*, 14 Johns. 484; *Draper v. Pattina*, 2 Speers, 292. And in *McDowel v. Chambers*, 1 Strob. Eq. 347, it was held that a deed in pencil was sufficient.

not negotiable, in which evidence of indebtedness is all that is wanted. The same remarks would apply to a signature or indorsement by initials, on which a similar ruling has been made.<sup>(z)</sup> The signature by a mark is admitted from necessity; but we think it should be declared and attested at the time, in writing, as the mark of the maker, although it may not be quite certain that the law requires this.<sup>(a)</sup>

A note may be written on any substance capable of holding writing,<sup>(b)</sup> although paper is most usual. Perhaps the law can put no other check or limitation on this than to say that everything unusual about a note subjects it to suspicion and rigid scrutiny, and the form, the manner, and materials must all be compatible with the requisite certainty. Thus, if the signature be in the body of the note, as "I, A, promise," &c., this has been declared sufficient; but it is *suspicious*.<sup>(c)</sup>

We have said that no particular form has been required by law; but many cases have turned upon the question whether there was precision and certainty enough in an instrument to constitute it a promissory note.<sup>(d)</sup> Perhaps it would be difficult to draw from the cases any other rule than that a note must contain a legal promise for the certain payment of a certain sum, and that the maker and the payee must be designated with sufficient certainty. If, to a receipt for money, the words "to be returned when called for" are added; <sup>(e)</sup> if the signer of

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(z) *Merchants' Bank v. Spicer*, 6 Wend. 443; *Palmer v. Stephens*, 1 Denio, 471. And in *Brown v. Butchers', &c. Bank*, 6 Hill, 443, where a party placed the figures "1. 2. 8." upon the back of a bill of exchange, in pencil, by way of substitute for his name, intending thereby to bind himself as indorser, it was held a valid indorsement, though it appeared he could write.

(a) *George v. Surr y, Moody & M.* 516, was an action of assumpsit by an indorsee against the acceptor of a bill of exchange drawn by *Ann Moore*, payable to her own order, and indorsed by her to the plaintiff. *Ann Moore* drew the bill by her mark, and it was indorsed by mark; the writing, "*Ann Moore*, her mark," on the indorsement, being in the plaintiff's handwriting. A witness was called to prove the indorsement, who stated he had frequently seen *Ann Moore* make her mark and so sign instruments, and he pointed out some peculiarity. *Tindal*, C. J., after some hesitation, admitted the evidence as competent, and the plaintiff had a verdict. See cases cited in preceding note.

(b) But see the citation from *Co. Litt.*, *supra*, p. 22, as to deeds.

(c) *Taylor v. Dobbins*, 1 Stra. 399: *Elliot v. Cooper*, 2 Ld. Raym. 1376.

(d) We shall state these cases fully when we come to consider the essential requisites of negotiable promissory notes, in our third chapter.

(e) *Woodfolk v. Leslie*, 2 Nott & McC. 585.

an instrument acknowledges in it that a certain sum of money "is due to A, payable on demand"; (*f*) or that a certain sum of money is borrowed on the promise of payment thereof; (*g*) or that a certain sum was received of A, to be repaid on demand with interest; (*h*) or to be repaid in one month; (*i*) or stating a balance due, for which "I am still indebted, and do promise to pay"; (*j*) we have authority for calling all of these instruments promissory notes. In one case, a promise "to pay or cause to be paid" was held to be sufficient. (*k*)

It is settled that a note need not contain the words "promise to pay," if there are other words of equivalent import. Therefore, where the defendant made a note by which he promised "to be *accountable* to A or order for £100, value received," this was held a good note within the statute. (*l*) So where the defendant gave a note by which he acknowledged himself "to be indebted to A in £——, *to be paid* on demand, for value received," this was held to be within the statute, the words "*to be paid*" amounting to a promise to pay. (*m*) So a direction to A to "*credit* B or his order *in cash*" in a certain sum, has been held to be a bill of exchange; the court saying "'credit in cash' is equivalent to 'pay.'" (*n*)

A mere acknowledgment of a debt is held in England to be no promissory note; the common illustration of which is the

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(*f*) *Pepoon v. Stagg*, 1 Nott & McC. 102; *Kimball v. Huntington*, 10 Wend. 675.

(*g*) *Ellis v. Mason*, 7 Dowl. P. C. 598.

(*h*) *Green v. Davies*, 4 B. & C. 235.

(*i*) *Shrivell v. Payne*, 8 Dowl. P. C. 441.

(*j*) *Chadwick v. Allen*, 2 Stra. 705.

(*k*) *Lovell v. Hill*, 6 C. & P. 238.

(*l*) *Morris v. Lee*, 2 Ld. Raym. 1396. The court said: "By the receiving the value, the defendant became a debtor; and when he promises to be accountable for it to A, it is the same thing as a promise to pay to A. And it is the stronger, because it is to be accountable to A or order, which is the proper expression used in such notes, and mentioned in the act of Parliament, where it is intended the note should be indorsable or negotiable. But it would be an odd construction to expound the word *accountable*, to give an account, when there may be several indorsees." See *Horne v. Redfearn*, 4 Bing. N. C. 433; *White v. North*, 3 Exch. 689; *Shrivell v. Payne*, 8 Dowl. P. C. 441; *Hitchcock v. Cloutier*, 7 Vt. 22; *Woodfolk v. Leslie*, 2 Nott & McC. 585.

(*m*) *Casborne v. Dutton*, Selw. N. P. (11th ed.), 401.

(*n*) *Ellison v. Collingridge*, 9 C. B. 570; *Allen v. Sea, Fire, & Life Ass. Co.*, 9 C. B. 574. But in *Woolley v. Sergeant*, 3 Halst. 262, it was held, that an order in writing directed to C, and requesting him to *credit* B or bearer thirty dollars, was not a bill of exchange.

"I. O. U. £ 200." (o) We should suppose that there could be no doubt of the correctness of this, on principle. Such an instrument, or any other form of a mere due bill without a promise, would be evidence in an action of assumpsit suited to the case, but could not, we think, be declared upon as a promissory note, nor be held entitled to any of the peculiar privileges of these instruments. Both from its name and its nature, we should have said that the note must contain, and must express, the *promise* of the debtor to pay the money; and it is going quite far enough to say that the word "promise" need not be used if there are other words of equivalent force and similar meaning, the fair construction of which would make them one form of a promise. Several American cases, however, hold any due bill to be a promissory note. (p) In England the question is more important than here, for if an instrument be a promissory note and have no stamp, it has there no validity whatever, while here it will be valid and available either as a note or as evidence of a debt; and as the difference becomes in this way, in many cases, more a matter of form with us than substance, this may be a reason why our courts construe writings of this kind with more laxity. But if the question arose on a negotiable instrument, and related to rights or obligations springing from indorsement, and which exist only in relation to this peculiar instrument, it might be supposed that our courts would be more cautious. If the word "payable" be inserted, it makes a promissory note in England and in this country; (q) and if the

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(o) *Fisher v. Leslie*, 1 Esp. 426; *Melanotte v. Teasdale*, 13 M. & W. 216; *Israel v. Israel*, 1 Camp. 499; *Childers v. Boulnois*, Dowl & R. N. P. 8. In *Guy v. Harris*, Ohitty on Bills (9th ed.), 526, Lord *Eldon* is said to have ruled that such an instrument was a promissory note, though not negotiable. "But it clearly is not such at this day," says Mr. *Byles*, citing *Tomkins v. Ashby*, 6 B. & C. 541, 9 D. & R. 543, *Moody & M.* 32. *Byles on Bills* (6th ed.), 10.

(p) *Cummings v. Freeman*, 2 Humph. 143; *Russell v. Whipple*, 2 Cowen, 536; *Marrigan v. Page*, 4 Humph. 247; *Harrow v. Dugan*, 6 Dana, 341; *Fleming v. Burge*, 6 Ala. 373; *Finney v. Shirley*, 7 Misso. 42; *McGowen v. West*, 7 Misso. 569; *Kimball v. Huntington*, 10 Wend. 675; *Johnson v. Johnson*, Minor, 263; *Lowe v. Murphy*, 9 Ga. 338; *Brewer v. Brewer*, 7 Ga. 584. See *contra*, *Read v. Wheeler*, 2 Yerg. 50. In *Franklin v. March*, 6 N. H. 364, it was *held*, that an instrument in these words, "Good to R. C. or order for thirty dollars, borrowed money," was a promissory note.

(q) *Pepoon v. Stagg*, 1 Nott & McC. 102; *Mitchell v. Rome R. R. Co.*, 17 Ga. 574; *Kimball v. Huntington*, 10 Wend. 675; *Waithman v. Elsee*, 1 Car. & K. 35; *Casborne v. Dixon*, Selw. N. P. (11th ed.), 401. And see *Brooks v. Elkins*, 2 M. & W. 74.

due bill be payable to "A or order," or to him "or bearer," it is a negotiable promissory note. If the principal purpose and effect of the writing are to set forth an agreement or bargain of sale, and the terms be stated, although the buyer expressly promise therein to pay at a time certain the amount agreed on, this is still only an agreement, and not a promissory note.(*r*)

An instrument under seal, though in all other respects in the form of a promissory note, is, according to the best authorities, not negotiable, and possesses none of the qualities of negotiable paper.(*s*)

There has recently been considerable discussion as to the nature of the instrument, in common use among bankers, called a certificate of deposit. It is usually in this form: "I hereby certify that Mr. A has deposited in ——— Bank one thousand dollars, payable twelve months from date, to his order, upon the return of this certificate. (Signed) B, Cashier." We think this instrument possesses all the requisites of a negotiable promissory note; and that seems to be the prevailing opinion.(*t*)

The anomalous case, in which a promise *never* to pay was held to be a promise to pay, (*u*) cannot be considered as exhibiting another form in which a valid note may be made, but only as an instance of the court's disregard and rejection of a word which must have been inserted merely by mistake, or else with a fraudulent purpose.

It is usual to write the sum in words in the body of the note,

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(*r*) *Ellis v. Ellis*, Gow, 216. The question in this case, however, arose upon the Stamp Act.

(*s*) *Clark v. Farmers' Manuf. Co.*, 15 Wend. 256; *Frevall v. Fitch*, 5 Whart. 325; *Hopkins v. Railroad Co.*, 3 Watts & S. 410; *Force v. Craig*, 2 Halst. 272; *Parker v. Kennedy*, 1 Bay, 398; *Parks v. Duke*, 2 McCord, 380; *Tucker v. English*, 2 Speers, 673; *Lewis v. Wilson*, 5 Blackf. 369; *Sayre v. Lucas*, 2 Stew. 259. But see, *contra*, *Porter v. McCollum*, 15 Ga. 528.

(*t*) *Miller v. Austen*, 13 How. 218; *Laughlin v. Marshall*, 19 Ill. 390; *Carey v. McDougald*, 7 Ga. 84; *Kilgore v. Bulkley*, 14 Conn. 362; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Welton v. Adams*, 4 Calif. 37; *Johnson v. Barney*, 1 Iowa, 531. But see, *contra*, *Patterson v. Poindexter*, 6 Watts & S. 227; *Charnley v. Dulles*, 8 Watts & S. 353, 361. And see *Sibree v. Tripp*, 15 M. & W. 23.

(*u*) *Anon.*, cited in 2 Atk. 32. This case is stated by Lord *Hardwicke*, and said to have been ruled by Lord *Macclesfield* on the Northern Circuit. In the commencement of the note, the consideration was said to be "20*l.* borrowed and received," and at the end were the words, "which I promise never to pay." It was held that there was a good foundation for an assumpsit, upon the lending on one side and the borrowing on the other, and that the words in the conclusion of the note would make no variation.

and also to put it in figures at the corner. If they differ, the question may be whether it is an ambiguity, and then whether it is fatal to the note, or may be cured by evidence, or whether it is no ambiguity because the written words prevail over the figures. So far as we have authority, the last would be the rule; in the English case in which it was, with some difficulty, so determined, the figures were for a larger sum, and the stamp was applicable to that sum.<sup>(v)</sup> In this country, where the figures could

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(v) *Saunderson v. Piper*, 5 Bing. N. C. 425. This was an action on a bill of exchange, by indorsees against acceptors. The bill was expressed in figures to be drawn for £245; in words, for two hundred pounds, with a stamp applicable to the higher amount: *Held*, that evidence to show that the words "*and forty-five*" had been omitted by mistake was not admissible, but that the acceptance must be taken to be for £200 only. *Tindal*, C. J. said: "This is a case of *ambiguitas patens*, and, according to the rules of law, evidence to explain such an ambiguity is not admissible. Where there is a doubt on the face of the instrument, the law admits no extrinsic evidence to explain it. Now, on the body of the bill in question, it appears to have been drawn for two hundred pounds; but in the margin, the figures express the sum of £245. If this creates any ambiguity, it is one which arises on the face of the instrument. . . . The evidence in question not being admissible, we cannot shake the rule of commercial writers, that, where a difference appears between the figures and the words of the bill, it is safer to attend to the words. If we take the authority of those writers where we have none of our own, this is a good bill for the sum expressed in the body, and therefore I am of opinion that the plaintiff is entitled to judgment for £200." *Bosanquet*, J.: "The question is, whether this instrument is a bill for £245, or £200, or whether it is altogether void. . . . It is true that there was abundant evidence to show that this was intended as a bill for £245, if that evidence was admissible; but the evidence was not admissible, because this is a case of patent ambiguity, and our rules of evidence exclude explanation where the ambiguity is patent. It is true, some foreign writers have said that in such a case the drawee should wait for instructions; and it would, no doubt, be prudent he should do so; that, however, cannot alter our rules of evidence. But the same writers also lay it down, that in the absence of instructions the words at length, and not the figures, are to determine the sum to be paid; and we think that is the rule that should be followed. The argument that pressed me most is the rule of *fortius contra proferentem*; that an instrument must be taken most strongly against the party making it. But there is no case in which that principle has been applied to an instrument, the body of which expresses a clear amount, and the ambiguity arises from a different amount expressed in the margin. Under such circumstances, the rule of law as to evidence must prevail." *Coltman*, J. was of opinion, that the rule, *fortius contra proferentem*, should prevail, and the bill be taken to be for £245. The commercial writers, alluded to in the above opinions, are *Marius* and his followers. In *Marius*, p. 53 (4th ed.), the rule is thus stated: "A bill of exchange, though written in few words, and contained in a small piece of paper, yet is of great weight and concernment in point of trade between merchant and merchant, and therefore ought to be written very plain and legible, and without any blots, or mending, or altering of any word thereof, that so there may not arise any doubt or scruple in the payment thereof; and therefore it is that usually merchants do write the sum that is to be paid as well in figures as in words at length, as you may observe by the several forms of bills of exchange



not be aided in that way, it should be held with still stronger reason, that the words control the figures. (*w*) If the words are written in the body of the note so obscurely that their meaning is doubtful, the figures in the margin may be referred to as explanatory of the intention of the parties. (*x*) If the printed words differ from the written words, then the latter will control, on the ground that the printed words were intended to apply to many cases, printed forms of instruments being always employed for classes and quantities only, and not for a single case, and the blank left to be filled in writing was left for the very purpose that the instrument might be especially adapted to each particular case. (*y*) It has been held that the sum may be in figures only,

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contained in this treatise ; and if it so fall out, that through unadvisedness, or error of the pen, the figures of the sum, and the words at length of the sum, that is to be paid upon any bill of exchange, do not agree together, either that the figures do mention more, and the words less, or that the figures do specify less, and the words at length more, in either, or in any such like case, you ought to observe and follow the order of the words mentioned at length, and not in figures, until further order be had concerning the same, because a man is more apt to commit an error with his pen in writing a figure than he is in writing of a word ; and also, because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and a breviat thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had ; and, although it may so fall out, that the sum mentioned in figures in the letter of advice and the sum mentioned in figures in the bill of exchange do agree, yet if the sum mentioned in words at length in the same bill do disagree, you ought to follow the order mentioned in words at length in the bill, and not the order in figures, for the reasons before alleged."

(*w*) *Payne v. Clark*, 19 Misso. 152 ; *Mears v. Graham*, 8 Blackf. 144. In *Smith v. Smith*, 1 R. I. 398, it was *held*, that the figures in the margin of a bill of exchange are merely a memorandum for convenience of reference, and form no part of the bill, and an alteration in them, without the consent of the drawer, making them conform with the body of the instrument, does not vitiate the bill ; and where the marginal figures differ from the body of the bill, evidence is not admissible to show that the bill was negotiated for the value expressed by the marginal figures, and not for the value expressed in the body of the bill. In *Burnham v. Allen*, 1 Gray, 496, it was *held*, that a promissory note, expressed to be for "thee hundred dollars," and in figures in the margin "\$ 300," was a good note for three hundred dollars, if the maker, when he signed it, intended "thee" for three ; and whether such was his intention was a question for the jury. In *Norwich Bank v. Hyde*, 13 Conn. 279, where a writing was given, in the form of a note, promising to pay — dollars, in the margin of which was written \$ 200, it was *held*, in an action against the indorser alleging a promise to pay two hundred dollars, that such writing was not admissible in support of the declaration ; the office of the memorandum in the margin being to remove an ambiguity in the body of the instrument, and not to supply a blank.

(*x*) *Riley v. Dickens*, 19 Ill. 29.

(*y*) See 2 Parsons on Cont., pp. 28, 29.

and not in words. If so, this would certainly be one of those irregularities which would subject the instrument to suspicion.(z)

In Louisiana, by statute, no bill, note, or other obligation for the payment of money, made within the State, is admissible as evidence of a debt when the whole sum is expressed in figures, unless accompanied by proof that it was given for the sum so expressed.(a) If, in a bill or note, the word "dollars" is omitted, or in England the word "pounds," these words will nevertheless be supplied.(b)

The question, whether a certain instrument is a promissory note or a bill of exchange, or either, at the election of the holder, will be considered hereafter, when we come to speak of bills of exchange.(c)

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(z) *Nugent v. Roland*, 12 Mart. La. 659; *Pilie v. Mollere*, 14 Mart. La. 666. This point was raised, but not decided, in *Gibson v. Irby*, 17 Texas, 173.

(a) Rev. Stat. La., 1856, p. 43. But fractional parts of a dollar may be in figures. *Id.*

(b) Thus, in *Phipps v. Tanner*, 5 C. & P. 488, it was *held*, that a bill of exchange for *twenty-five, seventeen shillings and three pence*, was a bill of exchange for twenty-five pounds, seventeen shillings, and three pence, and might be declared on as such; *Tindal*, C. J. saying: "It must mean pounds, and cannot mean anything else." So in *Booth v. Wallace*, 2 Root, 247, it was *held*, that in a note for "thirty-two, twelve shillings, and five pence lawful money," the word pounds is necessarily implied. So in *Northrop v. Sanborn*, 22 Vt. 433, it was *held*, that an order drawn for "37,89" was not void as being unintelligible; but the court would intend that the figures were used, as whole numbers and decimals, to express the currency of the United States. And see *Murrill v. Handy*, 17 Misso. 406; *Sweetser v. French*, 13 Met. 262; *Rex v. Elliot*, 1 Leach, C. C. 175; *M'Coy v. Gilmore*, 7 Ohio, 268; *Coolbroth v. Purinton*, 29 Maine, 469.

(c) See *Edis v. Bury*, 6 B. & C. 433.



## CHAPTER III.

### OF THE ESSENTIAL ELEMENTS OF A NEGOTIABLE PROMISSORY NOTE.

To learn what qualities are essential to a negotiable promissory note, we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose, the first requisite, that, indeed, which includes all the rest, is *certainty*. This means certainty, first, as to the persons who shall receive the money by which the note is to be paid and replaced when this representation ceases. Second, as to the person or persons who are to make this payment, and the order and conditions of their liability. Third, as to the amount to be paid. Fourth, as to the time when the payment is to be made. Fifth, as to the fact itself of the payment. It will be seen that the law endeavors to enforce, define, and protect all of these certainties as far as possible. Not, however, in such an exact and technical way as would only embarrass the transaction of business; but substantially, and in a perfectly practical way.

### SECTION I.

#### OF CERTAINTY AS TO THE PAYEE.

As to the person who is to receive the money, this may be either the original payee, or one who is made a subsequent payee by indorsement; of this indorsee we will treat subsequently, and now only of the original payee. This may be some one or more persons named, or the note may be made payable to bearer, and then the payee will be any person who comes into lawful possession of the note and presents it for payment. Such a note is negotiable, because it is transferable by delivery,

and the holder may sue on it in his own name; but it is not strictly negotiable in the full sense of the word, because it is scarcely capable of regular indorsement, and that part of the law of these instruments which relates to indorsement applies to it very imperfectly. If it be written, "Due the bearer," (a certain sum,) "which I promise to pay A or order," this is payable, not to bearer, but only to A or his order.(d)

If the note be not payable to bearer, but to a specific payee, the payee must be distinctly pointed out; though he need not be expressly named as such. Indeed, the payee is made the promisee by construction of law only, in most cases. To make him so, formally, the note should run, "I promise A to pay him or order"; and notes are sometimes so written, and always so described, when set forth in a declaration; but far more frequently they are written, "I promise to pay A or order," and the law construes this to mean that the promise was made to A. By an extension of the same principle of construction, where a receipt for money, by reason of a promise of repayment, is held to be a promissory note, as, "Received of A one hundred dollars, which I promise to pay on demand,"(e) the law construes the promise as made to A, and as being a promise to pay him; thus making him both promisee and payee. So if the instrument, though not naming any certain payee on its face, furnishes the means by which the payee can be certainly ascertained, it is sufficient. *Id certum est, quod certum reddi potest.* Therefore, if a note be made payable to "the administrators of the estate of A," it will be good.(f) On the same principle, an instrument payable "to the

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(d) *Cock v. Fellows*, 1 Johns. 143. The words of the note were, "Due the bearer hereof £3, 18, 10, which I promise to pay to Abraham Thompson or order, on demand." And the court said: "The word bearer has reference to Thompson as the payee, and as the promise is expressly to pay to him or order, another person could not maintain an action on the note without his indorsement."

(e) *Green v. Davies*, 4 B. & C. 235. *Bayley*, J. said: "No particular form of words is necessary to constitute a note, and *Chadwick v. Allen*, 2 Stra. 706, is in point to show that it is not necessary to name the payee more explicitly than this note does; the substance of the note there was, '£15, 5s., balance due to Sir Andrew Chadwick, I am still indebted, and do promise to pay.' Whom he was to pay was not in terms stated, but as no other payee was named, who, but Sir A. Chadwick, could be the object of his promise? So here, as the money was received from Boaz, he alone could be the person to whom the money was to be paid back." And see *Ashby v. Ashby*, 3 Moore & P. 186.

(f) *Adams v. King*, 16 Ill. 169; *Moody v. Threlkeld*, 13 Ga. 55. In *Bacon v. Fitch*,

trustees acting under the will of A," is a promissory note.(g) So a plaintiff suing on a promissory note which purports to be payable to a person of a different name may show by parol evidence that he was the person intended.(h) And it has been held, that if a bill be drawn payable to a fictitious payee, and indorsed in the name of such payee, and be afterwards accepted with a knowledge that the payee is fictitious, such bill may be treated, in the hands of a *bona fide* holder, as a bill payable to bearer.(i) And

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1 Root, 181, a note payable "to the heirs of A," who was then alive, was held sufficient.

(g) Megginson v. Harper, 2 Crompt. & M. 322.

(h) Willis v. Barrett, 2 Stark. 29; Hall v. Tufts, 18 Pick. 455; Jacobs v. Benson 39 Maine, 132.

(i) Minet v. Gibson, 3 T. R. 481, 1 H. Bl. 569; Collis v. Emett, 1 H. Bl. 312; Vere v. Lewis, 3 T. R. 182. In a note to Bennett v. Farnell, 1 Camp. 130, the learned reporter has given the following account of these cases: "Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co. and Gibson & Co., who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. The first case was Tatlock v. Harris, 3 T. R. 174, in which the Court of King's Bench held, that the *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor, for money paid or money had and received, upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In Vere v. Lewis, 3 T. R. 182, decided the same day, the court held, there was no occasion to prove that the defendant had received any value for the bill; as the mere circumstance of his acceptance was sufficient evidence of this; and three of the judges thought the plaintiff might recover on a count which stated that the bill was drawn payable to bearer. Minet v. Gibson, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the court was, that, where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after, the Court of Common Pleas laid down the same doctrine in Collis v. Emett, 1 H. Bl. 313. This decision was acquiesced in; but Minet v. Gibson was carried up to the House of Lords, 1 H. Bl. 569. The opinions of the judges being then taken, *Eyre*, C. B. (p. 598), and *Heath*, J. (p. 619), were for reversing the judgment of the court below, and Lord *Thurlow*, C. coincided with them (p. 625); but the other judges thinking otherwise, judgment was affirmed. 2 Bro. P. C., 2d ed., 48. The last case upon the subject reported is Gibson v. Hunter, 2 H. Bl. 187, 288, which came before the House of Lords upon a demurrer to evidence; and in which it was held, that, in an action on a bill of this sort against the acceptor to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons. *Vide* Tuft's case, Leach, Cro. Law, 206." It may be added, that the rule established by these cases is now of very little practical value; and if the question were still open, its correctness might be gravely doubted. See the dissenting opinions of *Eyre*, C. J. and *Heath*, J. See also Bennett v. Farnell, 1 Camp. 130, 180 c. But see Hunter v. Blodget, 2 Yeates, 480; Foster v. Shattuck, 2 N. H. 446; Plets v. Johnson, 3 Hill, 112; Farnsworth v. Drake, 11 Ind. 101; in which the English rule was adopted. By statute in New York promissory notes made payable to

when a note was made payable to the order of a real person, and his indorsement was forged, it was held that the maker was estopped from denying the validity of the note in the hands of a *bona fide* holder.(j) So the name of the payee may be left blank, and this will authorize any *bona fide* holder to insert his own name.(k) But, with these exceptions, the rule requiring the payee to be distinctly named is very strictly adhered to. It is expressly held, that if no one be designated as payee, either by name or as bearer, the instrument is not a promissory note.(l) And if the promise is in the alternative, as to pay A or B, it is insuffi-

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the order of the maker thereof, or to the order of a fictitious person if negotiated by the maker, have the same effect, as against the maker and all persons having knowledge of the facts, as if payable to bearer. *Stevens v. Strang*, 2 Sandf. 138. In *Davega v. Moore*, 3 McCord, 482, it was held, that a note payable "to order" only, without mentioning the name of any payee, was to be considered as payable to bearer in favor of a *bona fide* holder. See *Ellis v. Wheeler*, 3 Pick. 18; *Ball v. Allen*, 15 Mass. 433. In *Willets v. Phoenix Bank*, 2 Duer, 121, it was held, that a bank-check, payable to the order of bills payable, as it could not pass by indorsement, was, in judgment of law, payable to bearer. If the acceptor of a bill payable to a fictitious person be ignorant of the circumstance that the payee is fictitious, he is not liable, even to a *bona fide* holder *Bennett v. Farnell*, 1 Camp. 130, 180 c. So if the holder received the bill with a knowledge of this circumstance, he cannot recover. *Hunter v. Jeffery*, Peake's Add. Cas. 146.

(j) *Meacher v. Fort*, 3 Hill, S. Car. 227.

(k) *Attwood v. Griffin*, Ryan & M. 425; *Cruchley v. Clarence*, 2 Maule & S. 90; *Crutchly v. Mann*, 5 Taunt. 529; *Greenhow v. Boyle*, 7 Blackf. 56. But until the blank is filled up, the instrument is invalid. *Seay v. Bank of Tennessee*, 3 Sneed, 558.

(l) Thus, in *Brown v. Gilman*, 13 Mass. 158, an instrument in these words, "Good for one hundred and twenty-six dollars on demand," and signed, was held not to be a promissory note. See *Curtis v. Rickards*, 1 Man. & G. 46. And in *Douglass v. Wilkeson*, 6 Wend 637, it was held, that an indorsement on a note in these words, "Mr Olcott, pay on within \$750," was not a bill of exchange, draft, or check. So in *Gibson v. Minet*, 1 H. Bl. 569, 608, *Eyre, C. J.* said: "If I put in writing these words, 'I promise to pay £500 on demand, value received,' without saying to whom, it is waste paper. If I direct another to pay £500 at some day after date for value received, and not say to whom, it is waste paper." In *Mayo v. Chenoweth*, Breese, 155, the instrument was in this form: "This shall oblige me to pay thirty-five dollars on a judgment in the hands of Lewis Murphy, Esq., against Mark A. Sanders, in favor of John Chenoweth, with interest from this date till paid." (Signed,) "Jonathan Mayo" Held, that it was not a promissory note. And see *Matthews v. Redwine*, 23 Missis. 233; *Enthoven v. Hoyle*, 13 C. B. 373. In *Prewitt v. Chapman*, 6 Ala. 86, it was held that an instrument, purporting to be a bill of exchange, but which did not direct to whom the money was payable, might be the foundation of a suit, in the name of the person from whom the consideration moved, and to whom it was delivered by the drawer; but an action could not be maintained thereon by a third person, as bearer. In *United States v. White*, 2 Hill, 39, it was held, that a promissory note made payable to the order of the person who should thereafter indorse the same was valid and negotiable.

cient.(*m*) So an instrument payable "to the estate of M. L., deceased," is not a promissory note.(*n*) So an instrument containing a promise to pay a certain sum therein mentioned "to the secretary, *for the time being*, of the *Indian, &c. Assurance Society*, or his order," has been held not to be a promissory note.(*o*)

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(*m*) *Musselman v. Oakes*, 19 Ill. 81 ; *Blanckenhagen v. Blundell*, 2 B. & Ald. 417. This was an action on a note whereby the maker promised to pay to A *or* to B and C a sum therein specified, value received ; and it was held not to be a promissory note within the meaning of the statute of Anne. *Campbell*, *arguendo*, said : " This is a valid note within the statute of Anne, as between the original parties, although, perhaps, it may not be negotiable. It is not payable upon a contingency ; for a note payable to two partners, which in effect is payable to one or to the other, is equally so. So also, foreign bills of exchange, drawn in sets, may equally be said to be payable upon contingencies ; for the direction is to pay this my first bill of exchange, the second and third not being paid ; or the second, the first and third not being paid ; which is in effect directing the bill to be paid to the indorsee who may hold the first, or to the indorsee who may hold the second." But *Abbott*, C. J. said : " I have no doubt that this instrument, in the form in which it is declared on, is not a promissory note within the statute of Anne ; for if a note is made payable to one or other of two persons, it is payable to either of them only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute." *Bayley*, J. : " If there had been any community of interests stated between the payees so as in any respect to identify Damer and Blanckenhagen, it is possible that an action might have been maintained on this note, but in the way in which the declaration has been framed, stating this as a note payable to one or the other, I am very clearly of opinion that it is not that description of note which the statute of Anne contemplated." *Holroyd*, J. : " This note does not come within the description of notes contemplated by the statute of Anne. It is, in fact, a promise to pay A, if the maker does not pay to B and C. It is therefore a conditional promise, and, consequently, not within the statute." The same point was decided in *Walrad v. Petrie*, 4 Wend. 575. But *Marcy*, J. there said : " On the part of the plaintiff it is contended that the contingency is no greater than it would be if the word ' and ' was substituted for ' or, ' because, had the note been payable to Walrad *and* Bowman, payment to either would have been a satisfaction of the note ; we are, therefore, asked to consider the word ' or ' of the same effect as the word ' and. ' I should be inclined to accord in the views of the plaintiff, if I were not reluctant to establish a different rule here from that which seems to prevail in England on this point. It is important to our commercial interests, considering the intercourse existing between this country and England, that the statutes which are alike in both countries as to negotiable paper should receive the same construction, and be applied in the same manner." See *Samuels v. Evans*, 1 McLean, 473 ; *Spaulding v. Evans*, 2 McLean, 139.

(*n*) *Lyon v. Marshall*, 11 Barb. 241 ; *Tittle v. Thomas*, 30 Missis. 122.

(*o*) *Storm v. Stirling*, 3 Ellis & B. 832. Lord *Campbell*, in delivering the judgment of the court in this case, said : " The nature and every definition which we find in the books of a promissory note show that it must contain an express promise to pay to a person therein named or designated, or to his order, or to bearer. If the person to whom or to whose order it is to be paid is uncertain, and it depends on a contingency to whom, or to whose order, payment is to be made, it is not a promissory note, unless it can be treated as payable to bearer. It was urged, on behalf of the plaintiff, that we might treat this as a note made payable to the plaintiff, who at the date of the docu-

But if it had been "to the *now* secretary of the *Indian, &c. Assurance Society*, or his order," it would, as we have seen, have been sufficient.<sup>(p)</sup> If a note is payable to A, and there are two persons of that name, father and son, the note would be *prima facie* evidence of a promise to the father. But the son may show that he is in possession of the note, and is the person who authorized the bringing of the action.<sup>(q)</sup>

## SECTION II.

### OF CERTAINTY AS TO THE PAYER.

CERTAINTY is required as to the persons who are to make the payment, and the order and conditions of their liability. In the first place, the maker, who signs the note and is the promisor, is bound by his promise to pay the note. This signature must be

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ment was the secretary of the society, by his description as such secretary. . . . . There is no doubt, upon the authorities, that it is quite sufficient to make a note by a description or *designatio personæ* of this kind; but we do not think that we can put the above construction on the document now before us. The use of the words 'for the time being,' in the first instance, the repetition of them afterwards, and the whole form and scope of the instrument, satisfy us that the payment was to be made to the individual who, at the time of the instrument falling due, should fill the situation of secretary of the company, and not to the plaintiff, unless he happened to be the secretary at that time. It was, we think, clearly intended as a floating promise, the performance of which was to be made to the person being secretary when the document became due. The other construction would in effect be to hold that the words 'the secretary for the time being' meant the *now* secretary; but we think that the words were used for the very purpose of excluding that construction. . . . . It was suggested also, in the argument, that if there were no payee who could sue, the note might be treated as payable to bearer. But we think that in so holding we should give a meaning to the note contrary to the clearly expressed intention of the maker. This is not a case of fraud, or of a fictitious payee; but the defect is, that it is a promise to pay some person to be ascertained *ex post facto*; and we know no authority to show that under such circumstances we can hold this instrument to be a note payable to bearer, because, though valid, perhaps, as an agreement, it cannot be enforced as a promissory note. This promise is to pay to, or to the order of, an uncertain person. But if founded on good consideration, it may probably give rights, legal or equitable, to the society. But we think that we should be making a new instrument if we were to hold it a promissory note payable to bearer; and the case does not fall within any of the decisions cited on this branch of the argument."

(p) Per Lord Campbell, in *Storm v. Stirling*, *supra*. And see *Robertson v. Sheward*, 1 Man. & G. 511; *Davis v. Garr*, 2 Seld. 124; *Rex v. Box*, 6 Taunt. 325.

(q) *Sweeting v. Fowler*, 1 Stark. 106.

unambiguous and explicit, so as to leave no doubt of the person intended to be designated; because it is obvious that any doubt on this subject would impair, if it did not destroy, the utility of the document as an instrument of business; (r) and therefore it is, that we doubt whether courts should permit the signature of a *negotiable* note to be made merely by initials, or to be inserted in the body, (s) or at the beginning, or in the margin of the note, or elsewhere than at its close, which is the usual and proper place. (t)

The signature should be in the handwriting of the maker, unless made by his agent. Then this agency should be expressed; and the proper form of such signature is, "A, by B his agent" or "attorney." But if the signature were "B for A," this inaccuracy of form would not make it B's note, or prevent it from being A's note, if the signature were actually authorized, and the note were in all other respects regular. (u)

As a note, especially a promissory negotiable note, is not strictly a specialty, although formerly it was so regarded in one or two cases, the authority to make or sign or deliver it need not be under seal, nor even in writing. And if the note purports to be made by A by his agent B, and B had no authority, yet if A should afterwards adopt and ratify this signature, it would be effectual. If, however, only B's name was there, and there was neither expression nor intimation of agency, then the established rule that there can be no ratification of an act by an undisclosed principal, unless the act itself purported to be the act of an agent, would prevent A from making it by ratification his note. But he might, undoubtedly, guarantee it, or become surety for the payment, or assume its obligations in any other way he saw fit to do. In other words, if B makes the note as his own note, it can never become the note of any other maker; but if he makes the note as *agent* of A, although he has no authority, A can make the note his own by ratification.

If the signature be in the alternative, as if the note be signed

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(r) In *Sanders v. Anderson*, 21 Misso. 402, it was *held*, that a note signed "Steamboat Ben Lee and owners" was sufficient.

(s) See *supra*, p. 23, note c.

(t) It has been held, however, that a signature by initials is sufficient. *Merchants' Bank v. Spicer*, 6 Wend. 443; *Palmer v. Stephens*, 1 Denio 471

(u) See *post*, ch. 5, § 4.



"A or B," we should say it was not a sufficient signature to make a good promissory note against any person. In one case, a note written, "I, A, promise," &c., signed, "A or else B," was regarded as the note of A, signed by B as surety; probably on account of its peculiar phraseology.(v)

If the character in which a person writes his name on a bill or note is obvious and certain, it does not seem to be material on what part of the paper the signature is written.(w)

### SECTION III.

#### OF CERTAINTY AS TO THE AMOUNT.

*Amount must be written in body of note 59" IIa. Report. 444*

THERE should be entire certainty and precision as to the amount to be paid. The reason of this is especially obvious; for if the note is to represent money effectually, there must be no chance of mistake as to the amount of money of which it thus takes the place and performs the office. On this point, therefore, the cases are quite stringent. The sum must be stated definitely, and must not even be connected with any indefinite or uncertain sum, nor are we aware of any trustworthy cases in which the rule *Id certum est, quod certum reddi potest*, is permitted to supply the want of an express certainty on this point, as it seems to be in relation to some other of the certainties required in promissory notes. Thus, if the promise be to pay a certain sum, and also "all fines according to rule,"(x) or a certain

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(v) *Ferris v. Bond*, 4 B. & Ald. 679. The note was in these words: "I, John Corner, promise to pay," &c. (Signed,) "John Corner, or else Henry Bond." The action was against Bond; and the court said: "This is not a promissory note by this defendant within the statute of Anne. It operates differently as to the two parties. It is an absolute undertaking on the part of Corner to pay, and it is conditional only on the part of the defendant, for he undertakes to pay only in the event of Corner's not paying."

(w) *Clason v. Bailey*, 14 Johns. 484; *Hunt v. Adams*, 5 Mass. 358; *Carver v. Warren*, id. 545; *Saunderson v. Jackson*, 2 B. & P. 238; *Knight v. Crockford*, 1 Esp. 190.

(x) *Ayrey v. Fearnside*, 4 M. & W. 168. It was contended for the plaintiff in this case, that the words "and all fines according to rule" were altogether insensible, and might be rejected as surplusage. But *Parke, B.* said: "This instrument being declared on as a promissory note, the question is, whether the words 'and all fines according to rule' can be rejected as being altogether insensible, and, therefore, mere surplusage; and I think they cannot. It is quite possible that they have a meaning, and may import that certain pecuniary fines and forfeitures are to be paid by the defend-



sum, and also "all other sums which may be due,"(*y*) or a certain sum with interest, and also to pay "the demands of the sick club at, &c., in part of interest,"(*z*) or a certain sum, "the current rate of exchange to be added,"(*a*) or a certain sum, deducting what interest or money "A may owe the maker,"(*b*) or "deducting all advances and expenses,"(*c*) or a certain sum, "the same to go as a set-off," &c.(*d*) In neither of these cases can the instrument be considered as a valid promissory note, even for the specific sum which the maker promises to pay.

So a direction to pay to the order of A "whatever sum you may collect for me of C,"(*e*) or "the proceeds of a shipment of goods, value about £ 2,000, consigned by me to you," is not a bill of exchange.(*f*)

## SECTION IV.

### OF CERTAINTY AS TO THE TIME OF PAYMENT.

THE time when the money is to be paid is also to be certain. Here, however, the rule that what can be made certain is certain, is permitted to operate. Thus, if payable on demand, no one can say when the demand will be made, but when it is made the note becomes at once certainly due. If payable "when demanded," this, though an unusual phrase, means the same thing; so that the statute of limitations begins with such a note on the day of the date.(*g*) If payable "on demand with interest after six months," this is held to mean that the demand may be immedi-

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ants; and if so, this is certainly no promissory note within the statute, but is a specific agreement to do certain things, the consideration for doing which not being stated, the declaration is clearly bad."

(*y*) *Smith v. Nightingale*, 2 Stark. 375.

(*z*) *Bolton v. Dugdale*, 4 B. & Ad. 619. And see *Leeds v. Lancashire*, 2 Camp. 205; *Davies v. Wilkinson*, 10 A. & E. 98.

(*a*) *Philadelphia Bank v. Newkirk*, 2 Miles, 442.

(*b*) *Barlow v. Broadhurst*, 4 J. B. Moore, 471. See *Kalfus v. Watts*, Litt. Sel. Cas. 197.

(*c*) *Cushman v. Haynes*, 20 Pick. 132.

(*d*) *Clarke v. Percival*, 2 B. & Ad. 660.

(*e*) *Legro v. Staples*, 16 Maine, 252.

(*f*) *Jones v. Simpson*, 2 B. & C. 318.

(*g*) *Kingsbury v. Butler*, 4 Vt. 458.

ate, but that the interest will not begin unless the note lies unpaid six months, and not that the demand must be deferred until after six months. *(h)* But if payable with interest twelve months after notice, this means payable on demand at any time after twelve months have elapsed from the notice, and is sufficiently definite. *(i)* And in one case, where the note was written "on demand with interest after four months," and the words "on demand" had been partially erased, but could still be read, it was held to be payable in four months. *(j)* If payable "when I shall marry," or in so many days "after I shall marry," this is not sufficiently certain, because the promisor may never marry at all. *(k)* So if payable when certain property or goods are sold; *(l)* or "when my circumstances will admit without detriment to myself or family"; *(m)* or "thirty days after the arrival of a certain ship"; *(n)* or "when in funds," *(o)* it is not sufficient. So if payable in instalments, no time being stipulated for the payment of the instalments, it is not a promissory note. *(p)* If payable "when A shall come of age," this alone would not be enough, because he might die a minor; *(q)* but if, in addition to this, the day is specified on which he will be of age, this is held to be good, because the note will be payable when the day arrives, though A should die before the day. *(r)* So if payable within a limited time after a

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*(h)* Loring v. Gurney, 5 Pick. 15.

*(i)* Clayton v. Gosling, 5 B. & C. 360.

*(j)* Hobart v. Dodge, 1 Fairf. 156. In Conner v. Routh, 7 How. Miss. 176, it was held, that a note payable twenty-four after date was not void for uncertainty, nor a note on demand; but the holder might insert the time intended.

*(k)* Beadesley v. Baldwin, 2 Stra. 1151; Pearson v. Garrett, 4 Mod. 242, Comb. 227.

*(l)* De Forest v. Frary, 6 Cowen, 151; Hill v. Halford, 2 B. & P. 413. But see Ubsdell v. Cunningham, 22 Misso. 124.

*(m)* Ex parte Tootell, 4 Ves. 372; Salinas v. Wright, 11 Texas, 572.

*(n)* Palmer v. Pratt, 2 Bing. 185.

*(o)* Harrell v. Marston, 7 Rob. La. 34.

*(p)* Moffat v. Edwards, Car. & M. 16.

*(q)* Thus, in Kelley v. Hemmingway, 13 Ill. 604, it was held, that a note payable to a person "when he is twenty-one years old," is not a promissory note. Treat, C. J. said: "The payment was to be made when the payee should attain his majority, — an event that might or might not take place. The contingency might never happen, and, therefore, the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*."

*(r)* Goss v. Nelson, 1 Burr. 226.

man's death, this is held to be sufficient, because an event must occur which will make this definite; (s) and if the day of payment must come, it has been said that its distance is not material; (t) but this dictum must be received with much qualification. It has also been held, but as we think on insufficient grounds, that if payable a definite time after money which is due from the government shall be paid, this is certain enough, because it is certain that the government or nation will pay their debts. (u) It has also been held, where a negotiable note which was indorsed and sued by the indorsee was made payable "by the 20th of May, or when he completes the building according to contract," that this was a good note, because "payable absolutely at a day certain." (v) The reasons for this decision are not given, and it is

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(s) *Cooke v. Colehan*, 2 Stra. 1217, Willes, 393.

(t) In *Colehan v. Cooke*, Willes, 393, 396, *Willes*, C. J. said: "I put a question to the counsel, whether there is any limited time mentioned in any of the books beyond which if bills of exchange are made payable they are not good, and it was agreed by the counsel that they could find no such rule, and I am sure I can find none. But if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill. There is but one passage in the books wherein any notion to the contrary is so much as hinted at; and that is in *Scacchius de Commerciis*, where it is said that it had been formerly an objection against a bill of exchange, as contrary to the nature of it, that it was made payable at the end of seven months; but by his making use of the word 'formerly,' it is plain that in his opinion the law was then held to be otherwise."

(u) *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood*, 1 Wilson, 262.

(v) *Stevens v. Blunt*, 7 Mass. 240. So in *Goodloe v. Taylor*, 3 Hawks, 458, where a note was drawn as follows: "Against the 25th of December, 1819, or when the house John Mayfield has undertaken to build for me is completed, I promise to pay," &c., it was *held*, that the parties, by inserting a specific date of payment, had made it payable at all events, whether the house was completed or not; and that consequently the note was negotiable. In *Cota v. Buck*, 7 Met. 588, the instrument was in this form: "For value received I promise to pay J. P. or bearer \$ 570, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said P., which is to be paid in the course of the season now coming." *Held*, that it was a negotiable promissory note. *Shaw*, C. J. said: "This note, we think, was payable by the promisor at all events, and within a certain limited time. The note is obscurely written and ungrammatical. But we think the meaning was this; that the signer, for value received in the purchase of property, promised to pay Pero or bearer the sum named as soon as the termination of the coming season, and sooner if the amount could be sooner realized out of the fund. Such reference to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute, and did not depend on the fund. So as to the time, whatever time may be understood as the 'coming season'; whether harvest time or the end of the year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment." But in *Alexander v. Thomas*, 16 Q. B. 333, it was *held*, that

not easy to discover them, unless the note was read as a promise to pay on the 20th of May at all events, and sooner if the building was finished sooner. It has been held that a promise in writing to pay A a certain sum, "in such manner and proportions, and at such time and place, as he shall, from time to time, require," is a promissory note.<sup>(w)</sup>

In general, it is not essential to a note that it should be dated; <sup>(x)</sup> and if there be no date, it will be considered as dated at the time it was made.<sup>(y)</sup> If it be dated, the date will be *prima facie* evidence of the time when the note was made,<sup>(z)</sup> but not conclusive.<sup>(a)</sup> So a note may be dated forward or antedated.<sup>(b)</sup>

an order for a sum "payable ninety days after sight, or when realized," is not a bill of exchange, as the latter alternative makes the sum payable on a contingency. For the plaintiff it was said: "The meaning of the bill of exchange as described in the declaration is, that it is to be paid ninety days after sight at all events, or sooner if the drawee is in funds before that period." Lord Campbell: "Even on this construction it would be uncertain whether it would be payable at all within the ninety days, and if payable within that time, on what particular day it would be so payable." And afterwards his Lordship, in delivering his judgment, said: "If we could reject the words 'or when realized' as insensible, the bill would certainly be unexceptionable. But a reasonable meaning has already been ascribed to them, viz. 'or when you are in funds for the purpose.' I do not see why this alternative is to be taken as limited to the term before the expiration of the ninety days rather than after. I should say the meaning is, that the bill is to be paid at the end of ninety days if the drawee should be then in funds, if not, that it shall be payable afterwards. Even, however, if the other is the right meaning, namely, that the bill is payable sooner if the drawee should be sooner in funds, and if not, at the end of ninety days at all events, I think this would not be a good bill; for the holder would have to watch and ascertain the precise time when the bill should become payable, and, if he failed in doing this and in duly presenting it, the drawer would be discharged. I am of opinion that this is not a good bill of exchange, drawn according to the custom of merchants, so as to relieve the plaintiff from the necessity of stating a consideration for it." And see *Henschel v. Mahler*, 3 Denio, 428.

<sup>(w)</sup> *Goshen, & Co. Turnp. Co. v. Hurtin*, 9 Johns. 217; *Washington County Mut. Ins. Co. v. Miller*, 26 Vt. 77.

<sup>(x)</sup> See *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11.

<sup>(y)</sup> *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 B. & P. 173; *Giles v. Bourne*, 6 Maule & S. 73

<sup>(z)</sup> *Anderson v. Weston*, 6 Bing. N. C. 296; *Emery v. Vinall*, 26 Maine, 295; *Taylor v. Kinloch*, 1 Stark. 175; *Obbard v. Betham*, *Moody & M.* 483; *Smith v. Battens*, 1 *Moody & R.* 341. But see *Cowie v. Harris*, *Moody & M.* 141; *Rose v. Rowcroft*, 4 Camp. 245.

<sup>(a)</sup> *Dean v. De Lezardi*, 24 Missis. 424; *Aldridge v. Branch Bank*, 17 Ala. 45. But the maker, it seems, will not be allowed to contradict the date of the note, to the prejudice of a *bona fide* holder. *Huston v. Young*, 33 Maine, 85.

<sup>(b)</sup> *Gray v. Wood*, 2 Harris & J. 328; *Richter v. Selin*, 8 S. & R. 425; *Pasmore v. North*, 13 East, 517. The case of *Serle v. Norton*, 9 M. & W. 309, is entirely consistent

If dated forward, and any of the parties die before the day comes, such death will not affect the rights of a *bona fide* holder.(c)

## SECTION V.

### OF CERTAINTY AS TO THE FACT OF PAYMENT.

THE necessity of this certainty, which is perhaps the most important of all, is usually expressed by the rule, that the promise must not be on a contingency. The reason of this is very apparent. The paper is intended, if negotiable, to circulate in business as money; and this on the ground that on a certain day it will become money. It is perfectly obvious, therefore, that all chances of a failure in this respect must be avoided, against which it is possible to guard. The possibility of the insolvency of the promisor, or his inability to pay when the time of payment comes, is a risk that must always be borne; but it would be most unwise to add to this other contingencies; for if these could be estimated between the original parties, a subsequent holder of the paper, or one to whom it was offered in the course of business, might be wholly unable to judge of the probabilities of the contingency, and estimate the risk accordingly.

Thus, if the money be payable "provided J. S. shall leave me sufficient, or I shall otherwise be able to pay it," this is a fatal contingency.(d) So if the promise is connected with the receipt of drafts or notes, and is to be understood as a promise to repay them; if they are not paid, nothing will be due on the promise, and as it is not certain that they will be paid, this also is a contingency fatal to the character of the paper as a promissory note,

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with the statement in the text. It was there *held*, that a post-dated check is altogether void, and cannot be received in evidence for any purpose. But this decision proceeded entirely upon a provision in an English Stamp Act. Chancellor *Kent* seems to have supposed that it was independent of any statutory provision. In 3 *Kent*, Com. 75, note, he says: "In the late case in England of *Serle v. Norton*, 9 M. & W. 309, a post-dated check was held altogether void. We may well demur to that decision."

(c) *Pasmore v. North*, 13 East, 517. In this case it was *held*, that the indorsee of a bill of exchange, made payable sixty-five days after date, which was issued by the drawer and indorsed by the payee, who died before the day when it bore date, may make title through such indorsement, in order to recover on the bill against the drawer

(d) *Roberts v. Peake*, 1 Burr. 323.

even if it be not negotiable. (e) If payable provided terms expressed in certain letters or other documents are complied with ; (f) or on condition that the note shall be void if any dispute shall arise as to the consideration for it ; (g) or for the payment of all balances which shall be due from the maker to the extent of the amount expressed in the note ; (h) or payable when certain property is sold by the drawee ; (i) or if A shall not be surrendered to prison within a certain time ; (j) or if A shall not pay certain money on a certain day ; (k) or if it be payable only out of a particular fund, as "out of my growing subsistence," (l) or "out of rents," (m) or "out of money in the hands of," &c. ; (n) or "out of certain money as soon as it shall be received" ; (o) or "out of a certain payment when due ;" (p) or "for value received in stock, &c., this being intended to stand against me as a set-off for that sum left me by my father above my sister's share," (q) which would not be payable if the will were not finally carried into effect ; or "provided A shall not return to England, or his death be certified before," &c. ; (r) or payable "four years after date, if I am then living" ; (s) or

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(e) *Williamson v. Bennett*, 2 Camp. 417.

(f) *Kingston v. Long*, Bayley on Bills (2d Am. ed.), 14, n. (30), 4 Doug. 9.

(g) *Hartley v. Wilkinson*, 4 Camp. 127, 4 Maule & S. 25.

(h) *Leeds v. Lancashire*, 2 Camp. 205.

(i) *De Forest v. Frary*, 6 Cowen, 151.

(j) *Smith v. Boheme*, cited in *Jenney v. Herle*, 2 Ld. Raym. 1361, and in *Morris v. Lee*, 2 Ld. Raym. 1396. For the pleadings, see 3 Ld. Raym. 63.

(k) *Appleby v. Biddolph*, cited in *Morice v. Lee*, 8 Mod. 362.

(l) *Josselyn v. Lacier*, 10 Mod. 294, 317, Fort. 281.

(m) *Dict.* in *Jenney v. Herle*, 2 Ld. Raym. 1362.

(n) *Jenney v. Herle*, 2 Ld. Raym. 1361, 1 Stra. 591, 8 Mod. 266.

(o) *Dawkes v. De Lorane*, 3 Wilson, 207, 2 W. Bl. 782. In this case *De Grey, C. J.* said : "The instrument or writing which constitutes a good bill of exchange according to the law, usage, and custom of merchants, is not confined to any certain form or set of words, yet it must have some essential qualities, without which it is no bill of exchange ; it must carry with it a *personal* and certain credit given to the drawer, not confined to credit upon any *thing* or *fund* : it is upon the credit of a person's hand, as on the hand of the drawer, the indorser, or the person who negotiates it ; he to whom such bill is made payable or indorsed takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same."

(p) *Haydock v. Lynch*, 2 Ld. Raym. 1563.

(q) *Clarke v. Percival*, 2 B. & Ad. 660.

(r) *Morgan v. Jones*, 1 Crompt. & J. 162.

(s) *Braham v. Bubb*, Chitty on Bills (9th ed.), 135. *Abbott, C. J.* said : "I think this is not like a note payable on the maker's death, which is an event that must happen, but here it is contingent whether the note will ever be payable ; for if the maker should die within the four years, no payment is to be made."

at certain periods, the instalments to cease at the death of the payee; (*t*) or to pay one certain wages "if he do his duty as," &c.; (*u*) none of these promises would be held to be sufficiently absolute and free from condition or contingency to satisfy the requirements of a promissory note, even if it were not negotiable. On the same principle, a *guaranty* can never be a promissory note, for it is not an absolute promise to pay money. The contrary doctrine seemed at one time to be established in New York, (*v*) but it has been entirely overthrown by more recent cases. (*w*) The statement of a particular fund in a bill of exchange will not vitiate it, if it be inserted merely as a direction to the drawee how to reimburse himself. (*x*) So also, it is no objection to a bill or note, that it states the transaction out of which it arose, or the consideration for which it was given. (*y*)

In many of the above cases it was an order rather than a

(*t*) *Worley v. Harrison*, 3 A. & E. 669. If there is a contingency, it matters not whether it is one upon which the liability is to cease or to arise; in other words, whether it is a condition *precedent* or a condition *subsequent*. *Ib.*

(*u*) *Alves v. Hodgson*, 7 T. R. 241.

(*v*) *Lequeer v. Prosser*, 1 Hill, 256, 4 Hill, 420; *Hough v. Gray*, 19 Wend. 202; *Ketchell v. Burns*, 24 Wend. 456; *Miller v. Gaston*, 2 Hill, 188.

(*w*) See *Manrow v. Durham*, 3 Hill, 584, 2 Comst. 533; *Brown v. Curtiss*, 2 Comst. 225; *Hall v. Farmer*, 5 Denio, 484, 2 Comst. 553; *Brewster v. Silence*, 4 Seld. 207. And see *Leggett v. Raymond*, 6 Hill, 639; *Weed v. Clark*, 4 Sandf. 31; *Robins v. May*, 11 A. & E. 213; *Tinker v. McCauley*, 3 Mich. 188, overruling *Higgins v. Watson*, 1 Mich. 428.

(*x*) Thus, where A. B., by an order in writing, requested the defendant to pay to the plaintiff or order £9 10s. "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance," it was *held*, that this was a bill of exchange. The court said: "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person." *Macleod v. Snee*, 2 Stra. 762, 2 Ld. Raym. 1481. In *Reeside v. Knox*, 1 Miles, 294, 2 Whart. 233, it was *held*, that an order drawn by a mail-contractor upon the Postmaster-General for a certain sum, and directing him to charge the same "to my account for transporting the U. S. mail," was not a bill of exchange. The decision, however, was not based upon the form of the bill, but upon the fact that it was drawn upon government. *Sed quære*. See *United States v. Bank of the Metropolis*, 15 Pet. 377. See further, *Strader v. Batchelor*, 8 B. Mon. 168; *Rice v. Porter*, 1 Harrison, 440; *Bank of Kentucky v. Sanders*, 3 A. K. Marsh. 184; *Kelley v. Mayor of Brooklyn*, 4 Hill, 263; *Coursin v. Ledlie*, 31 Penn. State, 506.

(*y*) Thus, in *Haussoullier v. Hartsinck*, 7 T. R. 733, it was *held*, that a note by which A promised to pay to the bearer £50, "being a portion of a value as under deposited in security for the payment thereof," might be declared on as a promissory note. So in *Wells v. Brigham*, 6 Cush. 6, it was *held*, that an order directing the defendant to pay A. B. a certain sum, "which is due me for the two-horse wagon bought last spring," was a bill of exchange. And see *Fancourt v. Thorne*, 9 Q. B. 312; *Varner v. Nobleborough*, 2 Greenl. 121. See, however, *Van Wagner v. Terrett*, 27 Barb. 151.



promise, and the question was not whether a certain instrument was a promissory note, but whether it was a bill of exchange. In this respect, however, these instruments are precisely the same.(z)

As it is the purpose of promissory notes to represent money, and to perform, so far as possible, all its functions, it is of course necessary that they should be payable in money. A promise in writing, therefore, to pay or deliver specific articles, or to do any act other than pay money, has none of the characteristics or privileges of negotiable paper. And though it contain a promise to pay money, if it also contain a promise to do something else, it is not a promissory note. Thus, a note promising to deliver up horses and a wharf and pay money on a particular day is not a promissory note.(a) So if the promise is in the alternative to pay a certain sum in money *or* specific articles, it is not a promissory note.(b)

On one point there is some difference between the English authorities and our own, and some conflict in those of this country. In England it is held quite strictly that the promise must be to pay *money*; and a promise to pay a sum "in good East India bonds," or even "in cash or Bank of England notes,"

(z) The cases upon this subject are very numerous, but we do not deem it necessary to state them more at length. *Richardson v. Martyr*, Q. B. 1855, 30 Eng. L. & Eq. 365; *Raigauel v. Ayliff*, 16 Ark. 594; *Owen v. Lavine*, 14 Ark. 389; *Hamilton v. Myrick*, 3 Ark. 541; *Henry v. Hazen*, 5 Ark. 401; *Smalley v. Edey*, 15 Ill. 324; *Kinney v. Lee*, 10 Texas, 155; *Shenton v. James*, 5 Q. B. 199; *Dyer v. Covington Township*, 19 Penn. State, 200; *Mills v. Kuykendall*, 2 Blackf. 47; *Drury v. Macaulay*, 16 M. & W. 146; *Banbury v. Lisset*, 2 Stra. 1211; *Carlos v. Fancourt*, 5 T. R. 482; *West v. Foreman*, 21 Ala. 400; *Shields v. Taylor*, 25 Missis. 13; *Worden v. Dodge*, 4 Denio, 159; *Hodges v. Hall*, 5 Ga. 163; *Van Vacter v. Flack*, 1 Smedes & M. 393; *Crawford v. Cully*, Wright, 453; *Wiggins v. Vaught*, Cheves, 91; *Weidler v. Kauffman*, 14 Ohio, 455; *Cook v. Satterlee*, 6 Cowen, 108; *Atkinson v. Manks*, 1 Cowen, 691; *Waters v. Carleton*, 4 Port. 205; *Tucker v. Maxwell*, 11 Mass. 143; *Nichols v. Davis*, 1 Bibb, 490; *Smurr v. Forman*, 1 Ohio, 272; *Curle v. Beers*, 3 J. J. Marsh. 170; *Coolidge v. Ruggles*, 15 Mass. 387; *Fralick v. Norton*, 2 Mich. 130; *Drawn v. Cherry*, 14 La. Ann. 694; *Lanfear v. Blossman*, 1 La. Ann. 148.

(a) *Martin v. Chauntry*, 2 Stra. 1271. And see, to the same effect, *Wallace v. Dyson*, 1 Speers, 127; *Barnes v. Gorman*, 9 Rich. 297; *Austin v. Burns*, 16 Barb. 643; *Knight v. Wilmington & M. R. R. Co.*, 1 Jones, N. Car. 357; *Jerome v. Whitney*, 7 Johns. 321; *Saxton v. Johnson*, 10 Johns. 418; *Peppen v. Peytavin*, 12 Mart. La. 671.

(b) *Dennett v. Goodwin*, 32 Maine, 44; *Matthews v. Houghton*, 2 Fairf. 377; *Alexander v. Oaks*, 2 Dev. & B. 513; *Atkinson v. Manks*, 1 Cowen, 691.



was held not to be sufficient.(c) Such seems to be the rule in Massachusetts.(d) But in New York, "payable in York State bills or specie,"(e) was held good; and so was a note payable in "bank-notes current in the city of New York."(f) But one payable in "Pennsylvania or New York paper currency, to be current in the State of Pennsylvania or the State of New York," was held in New York not to be a good note.(g) In Pennsylvania, a note payable "in bank-notes of the chartered banks of Pennsylvania" was held not to be a negotiable note.(h) In Tennessee, it is held that a note payable "in current bank-notes," or "current bank-notes of Tennessee," is not a negotiable instrument.(i) In England, Bank of England notes are a legal tender by law excepting by the bank itself;(j) and in

(c) *Ex parte Imeson*, 2 Rose, 225; *Ex parte Davison*, Buck, 31; Bull. N. P. 272.

(d) *Jones v. Fales*, 4 Mass. 245; and see *Young v. Adams*, 6 Mass. 182.

(e) *Keith v. Jones*, 9 Johns. 120.

(f) *Judah v. Harris*, 19 Johns. 144.

(g) *Leiber v. Goodrich*, 5 Cowen, 186. *Sutherland, J.* said: "Payment in any bank-bills generally current in the State of Pennsylvania, although not current in this State, would satisfy the terms of the note. Its legal effect, therefore, is the same as though it had been payable merely in bank-bills current in the State of Pennsylvania. Are such bills known, approved of, and used in this State as cash? I believe that in truth most of the Pennsylvania bills pass only at a discount in this State. But if the fact be otherwise, it certainly is not so notorious that we can officially take notice of it. The note, therefore, is not payable in cash, but in something differing in value from cash. Of course it is not negotiable under the statute. . . . York State bills, and bank-notes current in the city of New York, have been held to be equivalent to lawful current money of the State. We may officially take notice that our own bank paper is, in conformity with common usage and common understanding, regarded as cash. But we cannot be supposed judicially to know the value of the paper currency of other States." The question in this case arose on a demurrer to the declaration. In *Thompson v. Sloan*, 23 Wend. 71, it was *held*, that a note made in New York for \$2,500, "payable at the Commercial Bank in Buffalo, in Canada money," was not negotiable. And in *Little v. Phenix Bank*, 2 Hill, 425, 7 Hill, 359, it was *held*, that a check drawn in New York upon a bank in Mississippi, payable in current bank-notes, was not negotiable.

(h) *M'Cormick v. Trotter*, 10 S. & R. 94. *Duncan, J.* said: "It was not a promise to pay money, either in legal contemplation or in the contemplation of the parties when they contracted. It is an unanswerable objection to the action, that the defendant might, according to this contract, have tendered the \$500 in the notes of any chartered bank, however depreciated their paper might be. In a note for money, nothing but current coin would be a tender." So in *Gray v. Donahoe*, 4 Watts, 400, it was *held*, that a note payable "in current bank-notes" was not negotiable.

(i) *Gamble v. Hatton*, Peck, 130; *Childress v. Stuart*, Peck, 276; *Kirkpatrick v. McCulough*, 3 Humph. 171; *Whiteman v. Childress*, 6 Humph. 303.

(j) See *post*, chapter on Bank-Notes.

this country no paper is so. It is a little remarkable, therefore, that the law in that country is more strict on this point than in our own. We think it not more strict only, but more sound and more in harmony with the nature, purpose, and function of negotiable paper. We add in a note a few additional authorities on this question.<sup>(k)</sup>

## SECTION VI.

### WHEN AN UNCERTAINTY IS MATTER OF FORM AND NOT OF SUBSTANCE.

It should be remarked, to prevent misconception, that the question whether such a condition, contingency, or uncertainty as either of those above enumerated prevents a written paper from being a promissory note, is, not unfrequently, one of form rather than of substance, unless the note be negotiable and negotiated, and the question occurs in relation to one or more persons who are parties to the note or interested in it under the law of indorsement. In that case, if the uncertainty were such that the instrument was not a negotiable promissory note, it would seldom be the case that it could have any obli-

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(k) In *Irvine v. Lowry*, 14 Pet. 293, it was *held*, that a note payable "in office notes of the Lumberman's Bank," was not negotiable. In *Hasbrook v. Palmer*, 2 McLean, 10, it was *held*, that a note executed in Michigan, payable in New York, in New York funds or their equivalent, was not negotiable. In *Fry v. Rousseau*, 3 McLean, 106, it was *held*, that a note payable "in current bank-bills" was not negotiable. To the same effect is *Collins v. Lincoln*, 11 Vt. 268, where the note was payable "in current bills." And see *State v. Corpening*, 10 Ired. 58; *Kirkpatrick v. McCulough*, 3 Humph. 171; *Whiteman v. Childress*, 6 id. 303. In *Swetland v. Creigh*, 15 Ohio, 118, it was *held*, that a note payable "in current Ohio bank-notes" was for a sum certain, and negotiable. The same was *held* in *White v. Richmond*, 16 Ohio, 5, where the note was payable "in current funds of the State of Ohio." See *Besancon v. Shirley*, 9 Smedes & M. 457. In *Lange v. Kohne*, 1 McCord, 115, it was *held*, that a note payable in "paper medium" was not negotiable. And see *Bank of Hamburg v. Johnson*, 3 Rich. 42. In *Lacy v. Holbrook*, 4 Ala. 88, it was *held*, that a note payable in "funds current in the city of New York" was negotiable. In Arkansas it has been *held*, that a note payable "in good current money of this State," or in "Arkansas money," is negotiable. *Graham v. Adams*, 5 Ark. 261; *Wilburn v. Greer*, 1 Eng. 255. Otherwise, if it be payable "in Arkansas money of the Fayetteville Branch." *Hawkins v. Watkins*, 5 Ark. 481. See *Wilamowicz v. Adams*, 8 Eng. 12; *Farwell v. Kennett*, 7 Misso. 595. In *Ogden v. Slade*, 1 Texas, 13, a note payable in lawful funds of the United States or its equivalent was held to be payable in gold or silver or paper currency, and was considered as negotiable under the "very peculiarly blended system of law and equity" in Texas. See also *Fleming v. Nall*, 1 Texas, 246; *Chevallier v. Buford*, id. 503.

gation or any efficacy whatever. Whereas, if the objection was fatal to the paper as a promissory note, but it was not negotiable, or, if negotiable, not negotiated, or indeed if it had been negotiated, but this question arose between the original parties, though it could not be declared upon as a promissory note, it might still be evidence of an agreement. And a party, by framing his case accordingly, might generally secure all the advantages which would belong to the instrument as a promissory note. But then he would be obliged to aver and to prove a consideration for the promise, and also that the condition had been performed, or that the contingency had occurred on which the promise was made. And if in the actual contract there was such a condition or contingency, and the plaintiff did not state it, the defendant might show it in defence. Whereas if the plaintiff relied upon the written instrument as a promissory note, it would not relieve him from the objection of contingency to aver and prove that the contingency had happened or the condition been performed on which the promise was dependent, because no such event could make a paper so written a promissory note. And on the other hand, if it were on its face free from any such objection, the defendant could not avoid the note by showing that such condition or contingency entered into the bargain; although he might, under certain circumstances, make out a substantial defence on this ground.

## SECTION VII.

### OF DELIVERY.

THIS is one of the essentials of bills and notes, for although it is often said that a note is *made*, when all we mean is that it has been written and signed, the note is not made in a legal sense, that is, it is not perfected, and the maker is under no obligation whatever as maker, until it is delivered.<sup>(1)</sup>

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(1) Hopper v. Eiland, 21 Ala. 714; Chamberlain v. Hopps, 8 Vt. 94; Lansing v. Gaine, 2 Johns. 300; Marvin v. McCullum, 20 Johns. 288. A indorsed a note, and died before delivery. His executor delivered it. Held that no title passed. Clark v. Boyd, 2 Ohio, 56; Bromage v. Lloyd, 1 Exch. 32; Clark v. Sigourney, 17 Conn. 511. Otherwise if delivered to a person who had made advances on the faith

Some questions have arisen as to what rights or obligations are created by promissory paper which was completely written and signed, but never actually delivered by the promisor, and was stolen from him, or lost by him and found by another, and by the thief or finder passed to an innocent holder for value. These questions are considered elsewhere.(*m*)

As a note takes effect only by delivery, so it takes effect only on delivery, and if this delivery be subsequent to the date, it is still to be considered as valid only from that day.(*n*) In the absence of evidence to the contrary, the law will presume that it was delivered on the day of the date.(*o*)

If it be made payable in so many days, or weeks, or months, from the date, this period must begin from the date which the paper bears, without reference to the day of actual delivery. For it is perfectly competent for the parties to agree that the money should be payable when they please, and they express their agreement on this point by making it payable in so many days from a certain day. Thus, if a note payable in three months from date, were delivered four months after date, it would be payable on demand.

If a note payable on time had no date, the time must be counted from the delivery. And this must be the actual delivery, if that can be proved. If not, then the time will begin from

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of the bill. . *Perry v. Crammond*, 1 Wash. C. C. 100. See *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11. Delivery is necessary to an acceptance. *Cox v. Troy*, 5 B. & Ald. 474, 1 Dow & R. 38, overruling *Thornton v. Dick*, 4 Esp. 270. The delivery must be to the party *as indorsee*. *Adams v. Jones*, 12 A. & E. 455; *Marston v. Allen*, 8 M. & W. 494; *Brind v. Hampshire*, 1 M. & W. 365. The date, not the time of delivery, fixes the time from which payment is to be calculated. *Bumpass v. Timms*, 3 Sneed, 459. So also the time from which the statute of limitations begins to run. *Montague v. Perkins*, C. B. 1853, 22 Eng. L. & Eq. 516.

(*m*) See *post*, chapter on Lost Notes.

(*n*) *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 B. & P. 173; *Giles v. Bourne*, 6 Maule & S. 73, 2 Chitt. 300. In *Powell v. Waters*, 8 Cowen, 669, it was *held*, that a note when delivered takes effect from its date by relation. So also *Snaith v. Mingay*, 1 Maule & S. 87; *Barker v. Sterne*, 9 Exch. 684. Hence a note dated on Sunday, but delivered on a week day, is valid. *Lovejoy v. Whipple*, 18 Vt. 379; *Aldridge v. Branch Bank*, 17 Ala. 45; *Drake v. Rogers*, 32 Maine, 524. See *Clough v. Davis*, 9 N. H. 500. Where a statute made certain kinds of promissory notes, issued after a given day, void, it has been held that the maker may prove a note dated before that day to have been delivered after it. *Bayley v. Taber*, 5 Mass. 286.

(*o*) *Sinclair v. Baggaley*, 4 M. & W. 312; *Anderson v. Weston*, 6 Bing. N. C. 296; *Roberts v. Bethell*, 12 C. B. 778.

the earliest day at which it can be shown that the holder, or some one from whom the holder derives title, had possession of the paper.<sup>(p)</sup> For where a note is in possession of a payee, the law will presume that it was delivered to him in accomplishment of the purpose for which it was written.<sup>(q)</sup> But this presumption is always open to rebutter.<sup>(r)</sup>

From the presumption of law in favor of possession, a promissor is bound to pay a note when due, in whosever hands it may then be, unless he can show that the holder has no legal right to it; for without this proof, he must presume, as the law presumes, that there had been a lawful delivery of it to the holder.<sup>(s)</sup>

It has been doubted whether a delivery which gives no interest in the paper can give title or authority to sue it in the name of the holder. We think it can; and that a plaintiff may recover

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(p) *Camp v. Tompkins*, 9 Conn. 545; *Woodford v. Dorwin*, 3 Vt. 82; *Clark v. Sigourney*, 17 Conn. 511; *Richardson v. Lincoln*, 5 Met. 201.

(q) See *Woodford v. Dorwin*, 3 Vt. 82. In this case it appeared "that in the first of the year 1820 Samuel Hurlburt, Canfield Dorwin, and T. M. Dorwin formed a copartnership in trade, which continued until the 1st of April, 1821, when they dissolved, and settled up their concerns as between themselves. Hurlburt left the country previous to 1828, but at what particular time did not appear. When he left, he deposited his papers in a box, and made it fast. In this box, it is said, the note in question was deposited. The 9th of May, 1828, Hurlburt addressed a letter to J. McNeil, in which it appears that Hurlburt and the Dorwins had money of Jerusha Woodford (one of the plaintiffs), and that the note in question would be found in the box. The two letters which the plaintiffs contend contain evidence of a new promise, or acknowledgment of the debt, are ambiguous: it does not distinctly appear that the money, which he says was borrowed of Mrs. Woodford, formed the consideration for the note, though it may be inferred. In the first he says: 'William has written me that Dorwins refuse to do anything about the note signed by them with me to Mrs. Woodford. I have no distinct recollection about my settlement with Dorwins,' etc. Again: 'I had none of the \$280 note you went after, which is in with your note in a box nailed up.' He then gives assurances that he will secure the plaintiffs and pay all he owes them shortly. In the other, of December 15, 1828, he says: 'Some time or other Messrs. C. & T. M. Dorwins and I, had some money of Mother Woodford, for our company's use, and she not wanting it, we kept it until we dissolved; and he says I was to pay that particular debt and he the others.' At the trial before the county court, the jury were instructed, that there could be no recovery on the note, as it did not appear to have been delivered by the firm to the plaintiffs or any other one, without which the contract was not complete." And the Supreme Court said they were "satisfied that the note ought to take effect from the delivery; and as the firm had then long been dissolved, it had no binding effect whatever upon this defendant. Therefore, the judgment of the county court must be affirmed."

(r) *Woodford v. Dorwin*, 3 Vt. 82; *Vallett v. Parker*, 6 Wend. 615.

(s) *Griswold v. Davis*, 31 Vt. 390.

if he produces the note at trial, because it will be presumed, in the absence of evidence to the contrary, that he recovers for the actual owner. We say, therefore, that it is quite enough to maintain the suit, that the owner delivered it to the present holder and plaintiff, for the purpose of an action, if this be not done fraudulently, or to the injury of the defendant.(*t*)

The presumptions in favor of possession, and the burden of proof which they create, will be more fully considered in a future section.(*u*)

A note, as well as a deed, may be delivered as an escrow, and the law of escrows is substantially the same in both cases. But the liability of the maker or indorser begins on the happening of the event, or the performance of the conditions for which it was delivered to the depository, without any actual delivery by him to the promisee.(*v*)

A note cannot be delivered directly to the promisee, to be held by him as an escrow.(*w*) And if it be delivered by the promisor only as an escrow to a depository, and is by him wrongfully disposed of, and passes into the hands of an innocent holder for value, the fact that it was delivered as an escrow will be no defence against the holder.(*x*)

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(*t*) *Austin v. Birchard*, 31 Vt. 589.

(*u*) For cases on this subject, see *Paterson v. Hardacre*, 4 Taunt. 114; *Solomons v. Bank of England*, in notes to 13 East, 135; *King v. Milsom*, 2 Camp. 5; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, 3 Johns. Cas. 259; *Aldrich v. Warren*, 16 Maine, 465; *Munroe v. Cooper*, 5 Pick. 412; *Wheeler v. Guild*, 20 Pick. 545.

(*v*) *Couch v. Meeker*, 2 Conn. 302. See *Bradley v. Bentley*, 8 Vt. 243.

(*w*) *Badcock v. Steadman*, 1 Root, 87. See, however, *Jefferies v. Austin*, 1 Stra. 674; *Goddard v. Cutts*, 2 Fairf. 440.

(*x*) *Vallett v. Parker*, 6 Wend. 615.

## CHAPTER IV.

### OF BILLS OF EXCHANGE.

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#### SECTION I.

##### WHAT THEY ARE.

As a promissory note is a written promise to pay money, so a bill of exchange is a written order for the payment of money. And it has been said that it must contain an *order*, or *direction*, and not a mere request as of a favor.<sup>(y)</sup> But it is difficult to draw a line between some of these cases.

There are some particulars in relation to damages, protest, &c., to be considered hereafter, in which the law of bills of exchange is regulated by statute. Even here, however, the statute is little more than a confirmation or equalizing of custom. In all other respects the law of bills of exchange is strictly a branch of the law merchant, *lex mercatoria*, invented and practised by merchants, and adopted and sanctioned by courts after it had become the known usage of merchants, and because it had become this usage. It is, therefore, peculiarly adapted to the wants and use of a mercantile community, or rather of that mercantile public, which, existing all over the world, by their mutual intercourse and the relations and connections growing out of it, constitute in some degree one community, embracing members of various, of distant, and sometimes even of hostile nations.

The bill of exchange is the principal instrument for the transfer of money from place to place. In this respect, it is greatly superior to the promissory note. If, for example, a merchant in New York owed, for goods purchased, one thousand pounds to a merchant in London, he might send him that money in gold or silver; or he might find some one in New York to whom some

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(y) See *Little v. Slackford*, Moody & M. 171; *Ruff v. Webb*, 1 Esp. 129.



London merchant owed a thousand pounds, and might give him the money, taking his note for it at sixty days; this note he might send to his London creditor, giving him the name of the London debtor of the promisor of the note; the London creditor might take the note to the London debtor, who might wish to save himself the trouble of sending the money to New York, and might, therefore, cash the note, and, when his New York creditor demanded payment, he might present to him this note by way of set-off. In this circuitous and inconvenient way both debts would be paid, and no money be sent across the ocean in either direction, one debt being made to pay the other debt. But the same result may be obtained more directly and conveniently by means of a bill of exchange. Let the New York debtor, whom we will call A, buy for a thousand pounds in dollars a written order from the New York creditor B, addressed to the London debtor C, requiring him to pay that amount to the order of A. Upon this A indorses an order to C to pay it to his London creditor D, and transmits it to D, who presents it for payment to C, and, receiving his money, both debts are paid.

Such an order would be a bill of exchange. It would, generally, be in this form. "New York, January 5, 1857. Value received, please pay to A, or order, one thousand pounds, in sixty days after sight, on account of your obedient servant, B. To C, London." Here B is the drawer; C is the drawee; A is the payee. As soon as D received the bill, with the order which A indorses upon it making it payable to him, he would, with all convenient promptitude, present it to C; firstly, that the sixty days after sight might begin to run; secondly, that he might know certainly whether C would pay the money as ordered. This presentment, therefore, is called a presentment for acceptance; because C must do one thing or the other, that is, he must accept the bill, and this he usually does by writing across the face of it the word "Accepted," with a date, and signing his name below the word; or he must refuse to accept the bill. As soon as he has accepted the bill, he is called the acceptor, and becomes bound absolutely to pay it according to its tenor, or the tenor of the acceptance, to the payee or his order. The payee may then indorse the bill, in like manner as the payee of a note may indorse the note, and acquire the same rights and incur the same obligations. The drawee may, as we have seen,



become an acceptor; but there is to a promissory note no such party as either drawee or acceptor. The rights, duties, and obligations of all of these parties will hereafter be fully considered. At present, we would lay the foundation for more particular investigation by the following general statements.

## SECTION II.

### OF THE OBLIGATIONS OF THE PARTIES.

THE maker or signer of a promissory note, by signing and delivering it, comes at once under an absolute obligation to pay it according to its tenor to any holder to whom it may be due at maturity; and such holder must look to the maker in the first place, and demand it of him in the manner prescribed by law, before he can look to any other party. Not so with the drawer or signer of a bill of exchange. He too comes under an obligation to pay it; but it is only an obligation to pay it if the drawee, or person whom he orders to pay the money, fails to pay it. For the payee, by receiving this order, undertakes to look to the drawee, and use the methods which the law prescribes to get payment from him. The making and delivery of the bill put the drawee under no obligation whatever beyond those which exist from the relations between him and the drawer. When it is presented to him, he can accept it or not; but if he does accept it, then he comes at once under an absolute obligation to pay the bill according to its tenor. It is obvious, therefore, that, until a bill be accepted, there is no party to it who holds the same position, and is under the same obligation, as the maker of a note; and that, when a bill is accepted, then the drawee, who has now become an acceptor, holds the place of the maker of a note, and is under the same obligations. But the drawer or signer of the bill, by the act of drawing and delivery, becomes bound to pay it if the acceptor does not. While the acceptor is as the maker, the drawer is therefore as the first indorser of a note. The drawer's name is on the face; and the bill cannot be called indorsed, strictly speaking, until the payee indorses it; and then the payee is apparently the first, and as yet the only, indorser; still he is, in point of legal obligation, the second indorser, for the

duties of the respective parties stand thus. The acceptor is bound absolutely to pay the bill; the drawer is bound to pay it if the acceptor does not; and the payee, having indorsed the bill, is bound to pay it if the drawer does not. The obligation of the drawer is peculiar in another respect also. He is not only bound to pay the bill if the acceptor does not, but he is bound to pay it if the drawee refuses to accept it. By such refusal there is no acceptor, and no person primarily bound to pay it. But that refusal was one of the conditions on which the drawer engages to pay it, because by drawing he engages that the drawee shall accept the bill on presentment. Therefore, if acceptance be refused, the obligation of the drawer may be made absolute at once by due notice, and if the payee had indorsed the bill before acceptance, as is frequently done, then his obligation is unaffected by non-acceptance, and he is still bound to pay, but only if the drawer does not. And, as the result of all this, the common phraseology of the books is, that the acceptor of a bill is as the maker of a note, the drawer as the first indorser, and the payee, after putting his name on the back, as second indorser. And viewing them as such parties, the whole law of demand, notice, and liability, which we shall discuss in future chapters, will be found to belong to them.

### SECTION III.

#### OF INLAND BILLS AND FOREIGN BILLS.

THERE is a distinction in respect to bills of exchange which has no analogy in promissory notes; it is that which divides them into inland (or domestic) and foreign bills; the effect and importance of this will be seen when we come to speak of protest and damages; at present we would only define them. In England, from which the distinction came to us, a bill is inland when made and payable within that kingdom; but if either made or payable abroad, meaning out of the kingdom, it is a foreign bill. Therefore, a bill drawn in Ireland and payable in England, is held in England to be a foreign bill, and would undoubtedly be so held in Ireland.<sup>(z)</sup> If drawn in England on a person abroad,

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(z) *Mahony v. Ashlin*, 2 B. & Ad. 478.

but payable in England, and accepted payable in England, it has been there held as falling within the definition of an inland bill, as both drawn and payable in England. (a) But the contrary was decided in this country at an early day. (b) That a bill drawn or payable in a foreign country would be held in this country to be a foreign bill, never was questioned; but it was at one time much doubted whether a bill would be held foreign in one of our States, which was drawn or payable in another of these States. But this question is now well settled by authority. The true criterion, which is exclusively to determine whether the bill be foreign or inland, would be found in the further question, whether the State in which the original question arises has, by its courts, full and complete sovereignty and jurisdiction over it. And as our States are so far foreign that the municipal law of each one is independent of that of every other, and the processes of courts do not go from one State to another, a bill so drawn must be held to be foreign. When the question came before the Supreme Court of the United States, under the statute which denies to the District or Circuit Courts cognizance of certain suits, "except in cases of foreign bills of exchange," (c) it was held, that a bill of

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(a) *Amner v. Clark*, 2 Crompt. M. & R. 468. In this case the bill was drawn in London payable to the order of the drawer in London, upon a merchant residing at Brussels, and accepted by him, payable in London. *Held*, that it was an inland bill, and must be stamped as such. It should be observed, however, that the question in this case arose under the English Stamp Act; and it is not certain that the decision would have been the same if the question had depended entirely upon the law merchant. The counsel for the plaintiff, after stating that the stamp act defined a foreign bill of exchange as a bill "drawn in, but payable out of, Great Britain," said: "It may be that there is another species of foreign bill, namely, when it is drawn in England upon a person residing abroad, and accepted by him payable in England." But *Bolland, B.*, in delivering his opinion, said: "An inland bill is a bill drawn in, and payable in, Great Britain, which this bill is."

(b) *Grimshaw v. Bender*, 6 Mass. 157. This was an action by the drawer against the acceptor of a bill of exchange. The bill was drawn in England by the plaintiff, an English merchant, upon the defendants, a commercial house, residing and doing business in Boston. One of the defendants, being in England at the time the bill was drawn, accepted it on behalf of the firm, "payable in London." *Held*, that it was a foreign bill, in reference to the measure of damages. *Parsons, C. J.* said: "It is manifest that the remedy contemplated by the parties, in the event of the bill being dishonored, must be sought in this State, where the acceptors lived. From this view of the case, the instrument must be considered as a foreign bill, having the same effect as if the payee had sent it to Boston, and it had been accepted, payable in London by the house here; in which case the money must be remitted to London to meet the bill returned to the drawer after acceptance."

(c) 1789, c. 20, s. 11, 1 U. S. Stats. at Large, 79.

exchange was a foreign bill, if it was drawn in one State and payable in another, although the drawer and payee were inhabitants of the same State.(d) The State courts have followed this authority.(e) A case in New York contains a *dictum* not in conformity with this rule.(f)

A bill may be in fact inland having regard to the place where it was drawn, but on the face of it appear to be foreign. Thus, for some reason, a Boston merchant, temporarily in New York, may draw his bill on a New York merchant, payable in New York, but may date it at Boston. Such a bill would undoubtedly be held to be foreign, in relation to innocent third parties who became interested in it in the belief that it was what it purported to be.(g) As between the original parties and others having notice of the circumstances under which the bill was drawn, the question would be more doubtful; but we think it would, even then, be held to be a foreign bill, especially if it appeared that it was drawn in that form for no wrongful purpose, but only that the bill might conform to the

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(d) *Buckner v. Finley*, 2 Pet. 586. *Washington, J.*, in delivering the opinion of the court, said: "We are all clearly of opinion that bills drawn in one of these States, upon persons living in any other of them, partake of the character of foreign bills, and ought so to be treated. For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign to, and independent of, each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed with great force by the President of the Court of Appeals of Virginia, in the case of *Warder v. Arell*, 2 Wash. Va. 298, where he states that, in cases of contracts, the laws of a foreign country, where the contract was made, must govern; and then adds as follows: 'The same principle applies, though with no greater force, to the different States of America; for though they form a confederated government, yet the several States retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign.'" And see *Lonsdale v. Brown*, 4 Wash. C. C. 86, 153.

(e) *Duncan v. Course*, 3 Const. R. 100; *Chenoweth v. Chamberlin*, 6 B. Mon. 60; *Cape Fear Bank v. Stinemetz*, 1 Hill, S. Car. 44; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Wells v. Whitehead*, 15 Wend. 527; *Green v. Jackson*, 15 Maine, 136; *Rice v. Hogan*, 8 Dana, 133; *Halliday v. McDougall*, 20 Wend. 81, 22 Wend. 264; *Brown v. Ferguson*, 4 Leigh, 37; *Carter v. Burley*, 9 N. H. 558; *Freeman's Bank v. Perkins*, 18 Maine, 292; *Warren v. Coombs*, 20 Maine, 139. See *Offit v. Vick*, Walker, 99, 104, n.

(f) *Miller v. Hackley*, 5 Johns. 375. This case contains only a *dictum* of *Van Ness*, *J.*, in conflict with the rule stated in the text. See *Wells v. Whitehead*, 15 Wend. 527.

(g) The contrary was decided in England in *Steadman v. Duhamel*, 1 C. B. 888, but that decision was based upon the stamp act. See *Lennig v. Ralston*, 23 Penn. State, 137.

drawer's usual course of business, and be what it would have been had he not happened to be at the time in New York. The converse of this has been decided. (*h*)

If a bill be signed in one place in blank, and sent to another to have the date, the names of the drawee and payee, and the amount and the place where payable, inserted, or if all these are written in, and the bill then sent to the drawer in another place for his signature, the bill will be taken to be made where it is signed, and will be held to be inland or foreign accordingly. (*i*) Every bill of exchange is, *prima facie*, an inland bill; and a party who would hold it as a foreign bill must allege and prove it to be so. (*j*)

## SECTION IV.

### OF THE SETS OF FOREIGN BILLS.

OF inland bills, usually, but one copy is made; but of foreign bills, usually, three copies are made, which together form what is called a set of exchange. The reason of this is, to guard against loss or question in case of miscarriage, the chances of

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(*h*) In *Strawbridge v. Robinson*, 5 Gilman, 470, it appeared that the bill was dated at a place in Illinois, where the parties resided, but was actually drawn in Wisconsin, where the parties happened to be at the time. *Held*, that it was an inland bill.

(*i*) Thus, where partners resident in Ireland signed and indorsed a copperplate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B in England for his use, who filled up the blanks and negotiated it; it was *held*, that this was to be considered as a bill of exchange by relation, from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary. And *Bayley, J.* said: "Suppose the person subscribing his name as drawer had died whilst the bill was on its passage, and afterwards the blanks had been filled up and the bill negotiated to an innocent indorsee; I should think that in that case the representatives of the party signing the bill would have been liable. This shows that when the whole is filled up, it has reference to the time of the signature, which in this case was made in Ireland." *Snaith v. Mingay*, 1 Maule & S. 87. And see, to the same effect, *Lennig v. Ralston*, 23 Penn. State, 137. So where a bill of exchange was written, and the acceptance of it made, in England, and it was afterwards transmitted to the drawer abroad for his signature, and was there signed, it was *held*, that the bill was a foreign one. *Boehm v. Campbell, Gow*, 55. And see *Crutchly v. Mann*, 5 Taunt. 529.

(*j*) *Armani v. Castrique*, 13 M. & W. 443.

the bill reaching in due season the party to whom it is transmitted being thus increased threefold. And the facility for presentment thus afforded has been held to hasten the time within which a bill should be presented for acceptance.<sup>(k)</sup> Usually, perhaps always, each copy of the set is designated on the face of it, the order being, "Pay this first of exchange, the second and third being unpaid," or, "Pay this second of exchange, the first and third being unpaid." But for this precaution the drawer might be held by an innocent purchaser of one copy, without notice that another existed.<sup>(l)</sup> Hence the custom, said to prevail, or to have prevailed, in Europe, of having no such caution on the first of exchange, and on the second saying only "the first being unpaid," <sup>(m)</sup> seems unsafe, for the first then gives no notice of the second and third, and the second gives no notice of the third. But an omission to name other parts, obviously by mistake, might not affect the rights of any party.<sup>(n)</sup>

The whole of the set constitutes, in law, but one bill, and therefore payment or cancelling of either copy of the set is a discharge of all.<sup>(o)</sup> A holder of either copy of the set is entitled

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<sup>(k)</sup> *Straker v. Graham*, 4 M. & W. 721.

<sup>(l)</sup> In *Wright v. McFall*, 8 La. Ann. 120, where the first and second of a bill of exchange were both accepted, with the knowledge and consent of the drawers, and without fraud or collusion between the holders and acceptors, it was *held*, that the drawers were liable on both.

<sup>(m)</sup> *Marius* (4th ed.), p. 7.

<sup>(n)</sup> *Bayley on Bills* (2d Am. ed.), p. 24.

<sup>(o)</sup> *Durkin v. Cranston*, 7 Johns. 442; *Ingraham v. Gibbs*, 2 Dallas, 134; *Miller v. Hackley*, Anthon, N. P. 68; *Perreira v. Jopp*, 10 B. & C. 450, n. (a). The case of *Holdsworth v. Hunter*, 10 B. & C. 449, was decided upon special circumstances. The drawee (who was also payee) of a foreign bill of exchange drawn in three parts, accepted and indorsed one part to a creditor to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part for value to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him. *Held*, that under these circumstances the holder of the part secondly accepted was entitled to recover on the bill against the acceptor. *Held*, also, by Lord *Tenterden*, C. J. and *Parke*, J., that the acceptor would have been liable on the part secondly accepted, even if the first part had been indorsed and circulated unconditionally. Lord *Tenterden* said: "According to the verdict of the jury, the delivery of the bills to the defendant's father was not absolute, but conditional, and I think that the facts of the case justified that finding. The parts first accepted cannot, therefore, be said to have been paid, for they were redeemed by the substitution of other securities. That being so, what was there to prevent the defendant from putting in circulation another part of the bills? But I am inclined to go further, and to say that the plaintiff would have been entitled to recover, even if the transfer to the father

to recover thereon, without producing the other copies, or accounting for their non-production. If another copy of the set has already been paid, and another person is the proper holder, and has given notice of his title to the party sued, or if any other ground of defence exists, which displaces the *prima facie* title of the plaintiff, the defendant must show it.(p)

On the continent of Europe, it seems to be not unusual for an original bill to be forwarded for acceptance, and in the mean time a copy of it negotiated; and it is said to be necessary that this copy should be marked as such, stating also where the original is; but we have no practice of this kind in this country, and it is said not to exist in England.(q) A protest may sometimes be made on the copy of a bill.(r)

## SECTION V.

### OF THE CERTAINTY REQUISITE IN A BILL OF EXCHANGE.

As a bill of exchange is intended to operate and be used as an instrument of business and as a representative of money, even more than a promissory note, and in order to do this it must be precise and definite in the facts which it states and the obligations which it imposes; therefore, all that was said, in the previous chapter, of the various certainties essential to a legal promissory negotiable note applies to a negotiable bill of exchange, always with as great, and in some respects with even greater, force. Although on these points, as on all others, the law merchant seeks to be reasonable rather than technical, yet here it is but reasonable to be very exact. It will be seen, therefore, as we go on presenting the law of negotiable paper,

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had been absolute and unconditional. For suppose two parts of a foreign bill come to the hands of the drawee, he accepts both, and indorses first one part to A and afterwards the other part to B. In any question as to property between them, A might be entitled to both. But the question here is, whether the acceptor and indorser shall be allowed to defend himself against the holder of the one part, on account of the previous circulation of the other part. I am not aware of any principle of law upon which such a defence can be supported."

(p) *Downes v. Church*, 13 Pet. 205; *Commercial Bank v. Routh*, 7 La. Ann. 128.

(q) *Byles on Bills*, 311.

(r) *Dehers v. Harriot*, 1 Show. 163.



that it requires, upon all matters which belong to the representative character of this paper, or, in other words, as to everything which makes it an accurately defined contract which must be executed promptly and accurately according to its precise tenor, a very great exactness. And it is perhaps true that the courts in many recent cases seem to be taught, by the increasing experience of the mercantile community, rather to increase and strengthen this exactness than to relax it in any way. Whatever favor the equities of a particular case may require, we believe that the general purpose of the law of negotiable paper, and the general good of a community among whom the use of this paper is now universal, requires at least all of the exactness and all of the stringency that the courts of England or of this country have ever applied to this subject.

In addition to the requisites of certainty in a promissory note, a bill of exchange must be reasonably certain as to the person to whom it is directed. An instrument which is not directed to any one is not a bill of exchange.<sup>(s)</sup> But where an instrument in writing possessed all the other requisites of a bill of exchange, and was made payable at a particular house, it was held suffi-

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(s) The case of *Regina v. Hawkes*, 2 Moo. C. C. 60, seems to have held a different doctrine. But we think that case would not now be regarded as law. In *Peto v. Reynolds*, 9 Exch. 410, *Parke*, B. said: "I cannot help observing, that, with the exception of *Regina v. Hawkes*, there is no case in which it has ever been decided that an instrument could be a bill of exchange where there was not a drawer and a drawee. With respect to that case, it does not seem to me entitled to the same weight of authority as a decision pronounced in the presence of the public, and on reasons assigned after hearing an argument in public. I must own that, but for that case, I should have had no doubt that the law merchant required that every bill of exchange should have a drawer and drawee." *Alderson*, B. said: "With respect to the question whether this instrument is or is not a bill of exchange, the case of *Regina v. Hawkes* is undoubtedly in point. I must own, however, that I now think that I was wrong on that occasion. The case seems to have been decided on the ground that *Gray v. Milner*, 8 Taunt. 739, governed it; and the fact was not adverted to, that *Gray v. Milner* may be thus explained: that a bill of exchange, made payable at a particular place or house, is meant to be addressed to the person who resides at that place or house. Therefore, in that case, the bill was on the face of it directed to some one; and the court held, that, inasmuch as the defendant promised to pay it, that was conclusive evidence that he was the party to whom it was addressed. But in the case of *Regina v. Hawkes*, the instrument was addressed to no one." *Martin*, B. said: "It seems to me that it is absolutely essential to the validity of a bill of exchange, that it should have a drawer and a drawee; and, except for the case of *Gray v. Milner*, I should have doubted whether the making a bill payable at a particular place was a sufficient address." See also *Reynolds v. Peto*, 11 Exch. 418.



cient, upon the ground that it must be considered as directed to the person residing at that house; and the defendant having accepted it, this was regarded as an acknowledgment that he was the person to whom it was directed.<sup>(t)</sup> The soundness of this decision has been questioned.<sup>(u)</sup> An instrument in the common form of a bill of exchange, except that the word *at* was substituted for *to* before the name of the drawee, has been held to be a bill of exchange.<sup>(v)</sup> If there was evidence that an instrument was so drawn for the purpose of deception, there would be no doubt that it would be a bill of exchange.<sup>(w)</sup> And it is not absolutely necessary that the drawee should be a different person from the drawer. For it is very common for a man to draw upon himself; and it has long been held, that such an instrument is a good bill of exchange.<sup>(x)</sup> But it may be treated as a promissory note, at the election of the holder.<sup>(y)</sup> The same principle applies where a copartnership carries on business at two different places, and one establishment draws a bill upon the other.<sup>(z)</sup> So where a duly au-

(t) *Gray v. Milner*, 8 Taunt. 739.

(u) See *Peto v. Reynolds*, *supra*, and *Davis v. Clarke*, 6 Q. B. 16.

(v) *Shuttleworth v. Stephens*, 1 Camp. 407; *Regina v. Smith*, 2 Moo. C. C. 295.

(w) *Rex v. Hunter*, Russ. & R. C. C. 511; *Allan v. Mawson*, 4 Camp. 115. In this last case *Gibbs*, C. J. said: "I shall leave it to the jury whether the word 'at,' from the manner in which it is written, was not inserted for the purpose of deception, and then the instrument is a bill of exchange in point of fact. The 'at' being struck out, it is in the common form in which bills of exchange are drawn. . . . I can see no motive for drawing an instrument in this form, except to deceive the public. If such instruments have been common in the country, they ought not to be continued or endured."

(x) See *Starke v. Cheesman*, Carth. 509; *Dehors v. Harriot*, 1 Show. 163; *Robinson v. Bland*, 2 Burr. 1077. In *Harvey v. Kay*, 9 B. & C. 364, *Bayley*, J. said: "In *Magor v. Hammond*, which was a special verdict in Common Pleas argued before the twelve judges, all the judges were of opinion that an instrument might be a bill of exchange, though the drawer and drawee were the same person." In *Davis v. Clarke*, 6 Q. B. 19, *Patteson*, J. said: "I do not know that a party may not address a bill to himself, and accept, though the proceeding would be absurd enough." See also *Wildes v. Savage*, 1 Story, 22; *Cunningham v. Wardwell*, 3 Fairf. 466.

(y) *Roach v. Ostler*, 1 Man. & R. 120; *Randolph v. Parish*, 9 Port. Ala. 76.

(z) Thus, in *Miller v. Thomson*, 3 Man. & G. 576, it was *held*, that an instrument in the form of a bill of exchange, drawn upon a joint-stock bank by the manager of one of its branch banks, by order of the directors, might be declared on as a promissory note. *Tindal*, C. J. said: "It is an instrument drawn by one of several partners, directing that a sum of money shall be paid by the partnership at a different place. There is an absence of the circumstance of there being two distinct parties as drawer and drawee, which is essential to the constitution of a bill of exchange. That being so,

thorized agent or officer of an incorporated company draws, in behalf of the company, upon the treasurer, cashier, or other officer of the company who has the custody of, and is charged with the duty of disbursing, the company's funds, this is in substance, it should seem, a draft by the company upon itself; and may be treated either as a bill of exchange or a promissory note.<sup>(a)</sup> And it may be laid down as a general rule, that whenever it is doubtful, upon the face of an instrument, whether it was intended as a bill of exchange or a promissory note, and it possesses the requisites of each, it may be treated as either, at the option of the holder. Thus, if an instrument begin, "I promise to pay," &c., like a promissory note, and be directed like a bill of exchange, it may be treated as either.<sup>(b)</sup>

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the only alternative is, that this instrument is a promissory note, and is properly declared upon as such." *Erskine, J.*: "The instrument is a draft by the company upon that branch of it which is carried on in London. It is, in effect, nothing but a promissory note." *Maule, J.*: "This is a bill drawn by the whole company, acting by their directors, upon the whole company. It is a promise made by one partner, acting on behalf of the company, under the order of the directors, that the company shall pay. It is a promise made by the company at Dorking to pay in London. It is, therefore, in effect, a promissory note."

(a) In *Allen v. Sea, Fire, & Life Ass. Co.*, 9 C. B. 574, the instrument was in this form: "Sea, Fire, Life Assurance Company. To the cashier. Thirty days after date credit Mrs. A. or order with the sum of £311, 9s. 6d., claims per 'Susan King,' in cash, on account of this corporation"; — and was signed by two of the directors of the company. *Held*, to be a promissory note. *Wilde, C. J.* said: "What is necessary to constitute a promissory note? These parties issue this instrument, importing that the company promise to pay. The note is addressed by the drawers to their own clerk. My brother *Shee* treats the cashier as a drawer [drawee?]. But at the trial it was insisted, for the plaintiff, that the instrument was precisely what we think it is. The company indicate that they mean to pay, by a direction to their officer to pay, and they point out to whom payment is to be made. It appears to me that the instrument contains all that is essential to constitute a promissory note." And see *Ellison v. Collingridge*, 9 C. B. 570; *Hasey v. White Pigeon B. S. Co.*, 1 Doug. Mich. 193. But in the *Marion & M. R. R. Co. v. Dillon*, 7 Ind. 404, *Perkins, J.*, delivering the opinion of the court, said: "If a man draw a bill or order directly upon himself, payable immediately, it is his promissory note, and may be sued on accordingly. In such case he is the payer as well as drawer, and by the very act of drawing admits he is to pay, and that he has not then the money with which to make payment. But where the debt is due from a company, and it is the duty of one officer or set of officers to allow demands and draw upon another officer who has the custody, and is charged with the duty of the disbursement, of the company's funds, for payment, such order must, as a general rule, be presented in a reasonable time for payment." See further, *Varner v. Nobleborough*, 2 Greenl. 121; *Wetumpka & C. R. R. Co. v. Bingham*, 5 Ala. 657; *Mohley v. Clark*, 28 Barb. 390.

(b) *Edis v. Bury*, 6 B. & C. 435. Lord *Tenterden* said: "This is an instrument at

The words "*Au besoin*," or "In case of need apply to A. B.," are sometimes written after the name of the drawee. This is

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least of a very ambiguous character. In form it is a promissory note, for it contains in terms a promise to pay the sum mentioned in it; but then in the corner of it there is the name of Grutherot, and it appears that his name is also written across the instrument. In that respect, although it does not in terms contain a request to Grutherot to pay, yet it resembles a bill of exchange. It is an instrument, therefore, of an ambiguous nature, and I think that where a party issues an instrument of an ambiguous nature, the law ought to allow the holder at his option to treat it either as a promissory note or a bill of exchange. That being so, I think it was competent to the plaintiff in this case to consider this as a promissory note; and if so, the notice of the dishonor was unnecessary." *Bayley, J.*: "I think that this was a promissory note, containing an intimation on the part of Bury that he would pay at Grutherot's house; and I think also, that where a party frames his instrument in such a way that it is ambiguous, whether it be a bill of exchange or a promissory note, the party holding it is entitled to treat it either as one or the other, and that the plaintiff ought not to be defeated by the party who framed the instrument being allowed to say that it is a bill of exchange." *Holroyd, J.*: "It seems to me that it was the design of the drawer of this instrument to hold out to the party taking it that he might treat it either as a bill of exchange or a promissory note. Besides, the words of an instrument are to be taken most strongly against the party using them; and, therefore, if there be any ambiguity in the words of this instrument, they ought to be construed favorably for the plaintiff, and against the defendant who made the instrument. Besides, until Grutherot put his name to this instrument, it was clearly in terms a promissory note; and having been once such, the fact of his having afterwards put his name to it as acceptor cannot alter the nature of it." *Littledale, J.*: "It seems to me that this was a promissory note. It begins with the words 'I promise'; it contains a promise to pay, and that is the form of a promissory note. But it is alleged that there is something at the foot of the instrument which converts it into a bill of exchange; a bill of exchange, however, is addressed to another person, and contains a request to the drawee to pay the same. In order to make this a bill of exchange, the words 'I promise' must be rejected; and those words constitute the essential difference between a bill of exchange and a promissory note. I think that they ought not to be rejected. Suppose they were rejected, could this instrument then have been declared upon as a bill of exchange before Grutherot accepted it? If it could not, then it was not a bill of exchange at that time; and if it was once a promissory note, Grutherot, by putting his name to it, could not make it a bill of exchange."

In *Lloyd v. Oliver*, 18 Q. B. 471, an instrument was drawn in the following form: "Two months after date I promise to pay to T. R. L." (plaintiff) "or order, £ 99, 15s." "H. Oliver." Underneath was written, on the left hand of the instrument, "J E Oliver" (defendant). Across it was written, "Accepted, payable S. & Co., bankers. London, E. Oliver." "E. Oliver" was signed by defendant. *Held*, that the instrument might be sued upon as a bill of exchange drawn by H. Oliver upon, and accepted by, the defendant. Lord *Campbell* said: "I am of opinion that this instrument, even before acceptance, might be treated as a bill of exchange as against Henry Oliver, the drawer. As against the defendant, it is clearly a bill of exchange. It is directed to John Edward Oliver; that must mean that John Edward Oliver is requested to pay the sum mentioned at two months after date, although there are no express words of request. The words 'I promise to pay' need not be rejected; they are to be considered as an expression of what otherwise would be implied, namely, that the maker will pay

for the purpose of pointing out some person to whom the payee may apply in case the drawee refuses to accept the bill. *(ba)*

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if the acceptor do not. The instrument is ambiguous, and might, no doubt, if the plaintiff chose, be treated as a promissory note. This is the effect of the decision in *Edis v. Bury*." *Erle, J.*: "As against the defendant, this instrument is clearly a bill of exchange. We must construe the language of it according to known mercantile usage. It has always been the custom, in drawing bills of exchange, to place the name of the party to whom the bill is directed in that part of the instrument where, in the present case, the name of John Edward Oliver, the defendant, is placed. According to the same rule, the word 'Accepted,' followed by a signature, as in the present instrument, implies acceptance of the bill by the party signing. I recollect that it was proved at the trial that the instrument had never been out of the hands of the parties to it until it was in its present form; so that it never could have been simply a promissory note, as has been suggested. It is not unjust to presume that it was drawn in this form for the purpose of suing upon it, either as a promissory note or as a bill of exchange." *Crompton, J.*: "The instrument contains, in my opinion, a clear direction to John Edward Oliver to pay, and a clear acceptance by him. It is, therefore, a bill of exchange. But it has been decided, and it is most important that the decision should not be impeached, that equivocal instruments of this kind, possessing the character both of promissory notes and of bills of exchange, may be treated as either."

*(ba)* 2 *Pardee*, n. 341, 348, 404, 421. See *Leonard v. Wilson*, 2 *Crompt. & M.* 589

## CHAPTER V.

### OF PERSONS WHO MAY BE PARTIES TO NOTES OR BILLS.

THERE can be no other rule as to those who may assume the obligations which rest on the makers, drawers, acceptors, or indorsers of negotiable paper, than that which is derived from their nature as instruments of business; namely, that they must be under no incapacity to transact business. This incapacity may be total or partial; and exactly measured by it is their inability to bind themselves as parties to bills and notes. Perhaps no one is incapable of benefiting by a bill or note of which he is promisee or indorsee. An infant, or married woman, or bankrupt may certainly receive a note, although payment should, generally at least, be made, not to such payees in person, but to those who have authority to represent them, as guardian, husband, or assignee.<sup>(c)</sup> So we should say a lunatic might receive a note; for although a note is not complete until it is delivered and accepted, and a person wholly wanting in intellect cannot accept anything, yet if the note were made in good faith and were in other respects unobjectionable, and if it were for the benefit of the lunatic and laid him under no obligations whatever, it should be regarded as accepted by him, or by some one for him as his guardian or trustee. Those who are incapacitated from effectually making or indorsing promissory notes and bills, in whole or in part, are infants, married women, persons under guardianship, lunatics, alien enemies, and bankrupts.

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(c) *Holliday v. Atkinson*, 5 B. & C. 501; *Teed v. Elworthy*, 14 East, 210, *Holt v. Ward*, 2 Stra. 937; *Warwick v. Bruce*, 2 Maule & S. 205, 6 Taunt. 118; *Nightingale v. Withington*, 15 Mass. 272.

## SECTION I.

## OF INFANTS.

ALL persons are infants, in law, who are under twenty-one years of age, excepting that in some of the States, at least for some purposes, a woman at eighteen is held to be adult.<sup>(d)</sup> All infants are said to be incapable of entering into contracts, excepting for necessities. And by necessities are meant, not only those things which are absolutely essential to life or even comfort, but such other things as are wanted by them and are suited to their means and their way of life.<sup>(e)</sup>

This incapacity or disability is intended for their benefit and protection against their own indiscretion, or the knavery of others. Hence the exception in respect to necessities; for these a child must have. Hence too the old distinction between the *void* and the *voidable* contracts of an infant; those being held to be voidable only which might be for his benefit, while those were void which could do him no good. But this distinction we suppose to be practically obsolete; all the contracts of an infant, not in themselves illegal, being capable of ratification by him when an adult, and therefore being voidable only; for if once absolutely void, no ratification could give them any force.<sup>(f)</sup>

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(d) Sparhawk v. Buell, 9 Vt. 41; Davis v. Jacquirn, 5 Harris & J. 100; Ohio Statutes, ch. 59; Maine Acts of 1852, ch. 291; Laws of Missouri, 1849, p. 67; Hartley's Dig. of Texas Laws, art. 2420.

(e) See 1 Parsons on Cont., pp. 244 - 246. And see Breed v. Judd, 1 Gray, 455.

(f) See 1 Parsons on Cont., pp. 243, 244. So far at least as regards bills and notes to which infants are parties, the rule now prevails universally, that they are not absolutely void, but voidable merely at the election of the infant. See Hunt v. Massey, 5 B. & Ad. 902; Gibbs v. Merrill, 3 Taunt. 307; Williams v. Moor, 11 M. & W. 256; Harris v. Wall, 1 Exch. 122; Reed v. Batchelder, 1 Met 559; Aldrich v. Grimes, 10 N. H. 194; Edgerly v. Shaw, 5 Fost. 514; Goodsell v. Myers, 3 Wend. 479; Taft v. Sergeant, 18 Barb. 320; Cheshire v. Barrett, 4 McCord, 241; Little v. Duncan, 9 Rich. 55. But see McMinn v. Richmonds, 6 Yerg. 9. It has sometimes been objected, that, unless the bill or note of an infant be held absolutely void, it will bind him in the hands of a *bona fide* holder for value. But this proceeds upon a mistake. The incapacity of a party to a bill or note is not one of the equities which cannot be set up against a *bona fide* holder. In this respect a subsequent *bona fide* holder stands upon the same footing as the payee, and he must inquire as to the capacity of the parties to the paper, at his peril. So, too, although it is said that the bill or note of an infant is not void, but voidable, it is not meant by this that it is valid until avoided, but merely

An infant may bind himself for necessities; but it may be doubted on some authorities whether this exception would go so far as to make good and enforceable his promissory note for the price. (g) The authorities are not in agreement on this subject: but on principle we should say that a distinction should be taken between a negotiable bill or note and one not negotiable. Formerly a simple bond given by an infant for necessities, that is, a bond for the payment of a sum of money, without penalty and without interest, might be valid, but not one which provided either for a penalty or for interest. (h) Now, no bond would probably be held obligatory. (i) If a note were given, even for necessities, it has been repeatedly held, that while the infant was responsible on a *quantum valebant* for the value of the necessities, his note for the amount was not binding, because this determined that amount positively, and it was necessary for the infant's effectual protection that this should be open to inquiry. (j)

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that it is capable of ratification. Until ratified, however, it has no validity. The rule is very accurately stated by *Gilchrist, C. J.*, in *Edgerly v. Shaw*, 5 Fost. 514. "The executory contracts of an infant are said to be voidable, but this word is used in a sense entirely different from that in which it is applied to the executed contracts of an infant. In the latter case, the contract is binding until it is avoided by some act indicating that the party refuses longer to be bound by it. In the former case, it is meant merely that the contract is capable of being confirmed or avoided, though it is invalid until it has been ratified." See also the excellent criticism upon the words "void" and "voidable," by *Bell, J.*, in *State v. Richmond*, 6 Fost. 232.

(g) The only case in England directly upon this point is *Williamson v. Watts*, 1 Camp. 552, at *Nisi Prius*. That was assumpsit on a bill of exchange against the acceptor. The defendant pleaded infancy. The plaintiff replied that the bill was accepted for necessities, and issue thereon. Upon the case being opened, Sir *James Mansfield* said: "This action certainly cannot be maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to." So also it is settled in England, that an action will not lie against an infant upon account stated, though the particulars of the account were for necessities. *Trueman v. Hurst*, 1 T. R. 40; *Bartlett v. Emery*, 1 T. R. 42, n. (a); *Williams v. Moor*, 11 M. & W. 256. And the reasons would seem to hold equally in the case of a promissory note or bill of exchange. In New York, too, it has been decided that a negotiable note given by an infant for necessities is not binding. *Swasey v. Vanderheyden*, 10 Johns. 33. And in New Hampshire, *McCrillis v. How*, 3 N. H. 348; *Conn v. Coburn*, 7 N. H. 368. And in Tennessee, *McMinn v. Richmonds*, 6 Yerg. 9. And, it seems, in New Jersey, *Fenton v. White*, 1 South. 100. And in Indiana, *Henderson v. Fox*, 5 Ind. 489. As to Kentucky, see *Beeler v. Young*, 1 Bibb, 519.

(h) The old cases upon this point are collected by Sergeant Manning, in a note to *Harrison v. Fane*, 1 Man. & G. 550.

(i) See *Beeler v. Young*, 1 Bibb, 519; *McMinn v. Richmonds*, 6 Yerg. 9.

(j) See cases *supra*, note g. The reasoning upon which these cases proceed is



If, however, the action were on a simple promissory note, not negotiable, or even on a negotiable note which had not been negotiated, an inquiry into the consideration might be made, which would seem to open the whole question; and the reason for denying the validity of such a note, while admitting a liability for the value of the necessities, might seem technical rather than substantial. Not so, however, if the note were negotiable and negotiated; for now it might pass for value into the hands of innocent third parties, and either its character would protect it from all inquiry into consideration, which might injure the infant, or for his protection this inquiry might be made, and then the document would lose the chief peculiarity and characteristic of negotiable paper. (t)

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well stated in *Mitchell v. Reynolds*, 10 Mod. 85. It was there said, *arguendo*, "that an infant could not, either by a parol contract or a deed, bind himself even for necessities in a sum certain; for should an infant promise to give an unreasonable price for necessities, that would not bind him; and therefore it may be said that the contract of an infant for necessities, *quatenus* a contract, does not bind him any more than his bond would, but only, since an infant must live as well as a man, the law gives a reasonable price to those who furnish him with necessities."

(k) It was expressly decided in *Swasey v. Vanderheyden*, 10 Johns. 33, that an action would not lie on a negotiable promissory note given by an infant for necessities, after it had been negotiated. And the court said: "A negotiable note given by an infant, even for necessities, is void. This we consider to be the law, and it is the opinion of respectable writers. (Chitty on Bills, 20, 1 Camp. 553, note.) The reason given is, that, if the note be valid in the first instance as a negotiable note, the consideration cannot be inquired into when it is in the hands of a *bona fide* holder, and the infant would thereby be precluded from questioning the consideration. For the same reasons it has been held (1 T. R. 40), that an infant cannot state an account, as that would preclude him from investigating the items. It has also been held (1 Camp. 552), that he cannot accept a bill of exchange for necessities." It has been decided, however, in several cases, that an action will lie on a note given by an infant for necessities, while it remains in the hands of the original payee, though it be negotiable in form. Thus, in *Earle v. Reed*, 10 Met. 387, it was held, that a negotiable note given by an infant was not void in the hands of the promisee; and in a suit thereon by the promisee, he may show that it was given, in whole or in part, for necessities, and may recover thereon as much as the necessities for which it was given were reasonably worth, and no more. That was an action of assumpsit on a promissory note, signed by the defendant in the presence of an attesting witness, and payable to the plaintiff or order. It appeared that the defendant was an infant when he gave the note, and that it was given for necessities. The action was not brought till after the lapse of more than six years from the time when the cause of action accrued; and the question was, whether the note was sufficient to take the demand out of the operation of the statute of limitations, under the provision (R. S. c. 120, s. 4) that the statute of limitations shall not apply "to any action brought upon a promissory note, which is signed in the presence of an attesting witness, provided the action be brought by the original payee, or by his executor or administrator." And the court, after much consideration,



An infant is liable for his torts in the same manner as an adult; but it seems that he is not bound by a bill or note given in satisfaction for a tort.<sup>(l)</sup>

It is now quite certain that an infant payee or indorsee can, by his indorsement, transfer a property in the note to a third party as against all parties prior to the infant. For though the note is voidable as against the infant, it is binding upon the other parties; and the indorsement of the infant is good until he avoids it.<sup>(m)</sup> And it *seems* that such indorsement may be made by the

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*held*, that it was. *Shaw*, C. J. said: "The distinction between the contract which subsists between promisor and promisee, on a note payable to order, but not indorsed, and that which would subsist between the promisor and an indorsee after an indorsement to a third person, is recognized and illustrated in the case of *Thurston v. Blanchard*, 22 Pick. 18. The difference is most important, as it applies to the present case. In the former, suppose it a note given on the sale of goods, it is a mere simple express contract to pay the price of the goods, and is itself rescinded by anything that rescinds the sale. In the latter, it is an absolute contract to pay the sum stipulated, in which in general there can be no inquiry respecting the consideration. Under these views we consider this note, in the hands of the promisee, as the simple contract of the defendant for the payment of money; and there being no consideration expressed, the infancy of the promisor being shown is *prima facie* a bar to the action. But as the consideration is open to inquiry, we think it is competent for the plaintiff to show that it was given for the price of necessities, in which he will recover only so much of the note as shall appear to have been given for necessities at their fair value, without regard to the price stipulated to be paid by the minor. This being a note valid as between the parties, we think it is saved from the operation of the statute of limitations, by the proviso that it shall not apply to any action brought upon a promissory note which is signed in the presence of an attesting witness, if brought by the original payee." In *Bradley v. Pratt*, 23 Vt. 378, an action was brought against the defendant as the maker of a promissory note, payable to the plaintiff or order. It appeared that, the defendant being indebted to one L. B. for necessities, and L. B. being indebted to the plaintiff, the defendant, at the request of L. B., gave the note in question to the plaintiff. It was *held*, that the plaintiff was entitled to recover. *Redfield*, J. said: "If it were not for maintaining the unimpeachable character of negotiable paper in regard to consideration, so that all might safely take it, I do not see why the rights of infants, in regard to acceptances and notes negotiated, might not be saved by allowing them, as an exception to the general rule, to show their infancy, and then for the plaintiff to meet it by proving the contract to have been given for necessities. But this has not been done, and probably could not be done, without too great an infringement of the rules of law in regard to negotiable paper while current." It seems that the same rule prevails in South Carolina. See *Dubose v. Wheddon*, 4 McCord, 221; *Haine v. Tarrant*, 2 Hill, S. C. 400. But see *contra*, *Bouchell v. Clary*, 3 Brev. 194.

(l) *Hanks v. Deal*, 3 McCord, 257.

(m) *Taylor v. Croker*, 4 Esp. 187; *Grey v. Cooper*, 3 Doug. 65; *Jones v. Darch*, 4 Price, 300. And see *Drayton v. Dale*, 2 B. & C. 293; *Jenne v. Ward*, 2 Stark. 326, 1 B. & Ald. 653. This question was well considered in *Nightingale v. Withington*, 15 Mass. 272, where *Parker*, C. J., delivering the opinion of the court, said: "That an infant may indorse a negotiable promissory note, or a bill of exchange, made payable

agent or attorney of the infant, or at least, that such an indorsement is susceptible of ratification by the infant after he becomes of age.(n)

Acceptance by an infant, or indorsement, is voidable as against himself, in the same way that the making of a note or drawing of a bill would be. But if a bill drawn upon an infant were accepted by him after he had become adult, this acceptance would be valid.(o) It has been held, that if an action be brought against an infant for goods sold for trade, and a ratification proved, made by him when adult, but *after* the action was commenced, this is not enough; the Court distinguishing it from a ratification or new promise made after suit, which was permitted to remove the bar of the statute of limitations, and one of them saying expressly that the contract for goods sold for trade was not *voidable*, but *void*, and therefore could not be ratified, although it might be the ground

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to him, so as to transfer the property to an indorsee for a valuable consideration, seems to be well settled in the law merchant, and is noways repugnant to the principles of the common law. Such indorsement is not like one made by a *feme covert*; for a note payable to her becomes the property of her husband; and further, her acts are absolutely void, whereas those of an infant are voidable only. It would be absurd to allow one, who has made a promise to pay to one who is an infant or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise; and it would impair the value of such contracts in the hands of infants, if they were unable to raise money upon them, as others may do. Whether an infant may avoid an indorsement so made, and oblige the promisor to pay to him, is a question not arising in this case; for there has been no countermand or revocation of the order to pay, which is implied in his indorsement. If an action should be brought against the infant as indorser for the default of payment by the promisor, without doubt he may avoid such action by a plea of infancy. But that is a personal privilege, which none but himself can set up in avoidance of any contract made in his favor." *Hardy v. Waters*, 38 Maine, 450, is to the same effect. And see *Burke v. Allen*, 9 Fost 106.

(n) In *Whitney v. Dutch*, 14 Mass. 457, where one of two partners in trade was an infant and the other of full age, and the adult, for a debt of the copartners, made a promissory note in the name of the firm, and the infant, after coming of full age, ratified it, it was held good against him. Upon the authority of this case it was held, in *Hardy v. Waters*, 38 Maine, 450, that an infant promisee of a negotiable note might indorse the same by an agent or attorney, and that an indorsement so made is valid until avoided by the infant or his representatives. But *Whitney v. Dutch* would seem to be an authority only for holding that such an indorsement may be made good by ratification after the infant becomes of age; not that it is good until avoided. And we are not certain that it is an authority for so much as this, for the making of a note, as in *Whitney v. Dutch*, is an executory contract; but an indorsement, so far as it operates as a transfer, is a contract executed. See *Semple v. Morrison*, 7 T. B. Mon. 298.

(o) *Stevens v. Jackson*, 4 Camp. 164.

of a valid new promise.(p) But if the decision is to be regarded as going this length, it cannot, it seems, be law. For then a bill or note executed by an infant could never be so ratified as to support an action. But it is settled by repeated decisions, not only that this may be done, but that the bill or note when ratified may be negotiated, and possesses in all respects the same qualities as if executed by an adult.(q)

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(p) *Thornton v. Illingworth*, 2 B. & C. 824. *Bayley*, J. said: "In the case of an infant, a contract made for goods, for the purposes of trade, is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him on the ground of his taking upon himself a new liability, upon a moral consideration existing before; it does not make it a legal debt from the time of making the bargain." *Holroyd*, J.: "There was no legal right capable of being enforced in a court of law at the time when the action was commenced. Where the statute of limitations has run, a new promise revives the debt *ab initio*, and that is equally the case whether the promise is made before or after the commencement of the action. Here no ground of action, capable of being enforced in a court of law, existed at the time when the action was brought; there was no foundation upon which the action could rest. The new promise was the sole ground of action, and not the revival of an old one." *Littledale*, J.: "When the statute of limitations is relied upon, an acknowledgment admits the perpetual existence of the debt, and therefore it suffices whether it is made before or after the bringing of the action. But the contract of an infant, under such circumstances as the present, being void, and not voidable, the promise in this case did not prove that any legal cause of action existed at the time when the action was commenced." So far as regards the point decided, this case has generally been followed in this country. *Merriam v. Wilkins*, 6 N. H. 432 (overruling *Wright v. Steele*, 2 N. H. 51); *Hale v. Gerrish*, 8 N. H. 374; *Ford v. Phillips*, 1 Pick. 202; *Goodridge v. Ross*, 6 Met. 487; *Thing v. Libbey*, 16 Maine, 55. See *contra*, *Best v. Givens*, 3 B. Mon. 72. But the *dicta* of some of the judges have been qualified by the later decisions in England. See *Williams v. Moor*, 11 M. & W. 256; *Harris v. Wall*, 1 Exch. 122. And see next note.

(q) *Hunt v. Massey*, 5 B. & Ad. 902. This was an action by the drawer against the acceptor of a bill of exchange. It appeared that the defendant was an infant when he accepted the bill, but there was evidence of a ratification after he became of age. It was objected (*inter alia*) for the defendant, that the plaintiff ought to have declared specially, and not on the acceptance; because the defendant "was liable, if at all, not by reason of his acceptance of the bill, but of a promise made after he had come of age." *Taunton*, J.: "Where a voidable contract is made by a party under age, and ratified after he has attained his full age, is it not usual to declare on the original promise? The first promise here was voidable only. As soon as it was ratified, it became binding *ab initio*." *Patteson*, J.: "If the defendant had pleaded infancy specially, the plaintiff might have replied, that after he had attained the age of twenty-one years he assented to and ratified and confirmed the several promises in the declaration." Lord *Denman*: "The evidence amounted to a ratification of the original promise to pay, according to the tenor and effect of the bill of exchange, and might be declared on accordingly." In *Reed v. Batchelder*, 1 Met. 559, it was *held*, that a negotiable note made by an infant is voidable, and not void; and if he, after coming of age,

What is a sufficient ratification or confirmation is sometimes a difficult question. It is a general rule that a promisor cannot avail himself of his mistake of the law, although he may of his mistake of facts. On this ground it might be said, that if an adult knew that a note was made by him when an infant, but did not know that it was therefore voidable by him, and thereupon ratified it, this should be a valid confirmation. There are, however, authorities which hold that the confirmation must be made by the adult with knowledge that he is not liable on the note without such confirmation.<sup>(r)</sup> It seems, even if this be law, that such knowledge will be presumed, in the absence of any evidence to the contrary.<sup>(s)</sup>

It seems also necessary that the recognition of the note should be explicit, and a declaration made that the promisor considers himself bound to pay the note.<sup>(t)</sup> If this be done substantially, it is sufficient, whatever the form may be; as if one says the amount is due, and as soon as he reaches home he will endeavor to get the money and pay it.<sup>(u)</sup> So a declaration of intent to pay, together with an authorizing of an agent to pay

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promise the payee that it shall be paid, the payee may negotiate it, and the holder may maintain an action in his own name against the maker. That was an action on a promissory note, made by the defendant, payable to Reed & Dudley or bearer, and by them transferred to the plaintiff. *Shaw*, C. J. said: "The question is, whether, as this was a negotiable note payable to Reed & Dudley or bearer, and ratified by a new promise to them whilst they remained the holders, they could make a good title by delivery to the plaintiff, Robert Reed, so as to enable him to bring the action in his own name. The new promise to pay was made to Henry Reed, of the firm of Reed & Dudley. The effect of this was to ratify and confirm the contract, and give it the same legal effect as if the promisor had been of legal capacity to make the note when it was made. This made it a good negotiable note from that time, according to its tenor, transferable by delivery; of course, when transferred to Robert Reed, the plaintiff, he took it as a negotiable note, and may maintain an action on it. This deprives the promisor of none of his immunities as an infant, because the law considers him as having full capacity when the ratification was made, and without such ratification no action would lie." So in *Edgerly v. Shaw*, 5 Fost. 514, the defendant during infancy made a promissory note payable to one Barker or order, and by him indorsed to the plaintiff. Before Barker transferred the note, the defendant, having come of age, promised him that he would pay it. *Held*, that the promise to pay Barker was a ratification of the note, and that the indorsee might avail himself of it in an action. And see *Goodsell v. Myers*, 3 Wend. 479; *Lawson v. Lovejoy*, 8 Greenl. 405; *West v. Penny*, 16 Ala. 186; *Fant v. Cathcart*, 8 Ala. 725; *Cheshire v. Barrett*, 4 McCord, 241.

(r) *Hinoly v. Margaritz*, 3 Penn. State, 428; *Harmer v. Killing*, 5 Esp. 102.

(s) *Taft v. Sergeant*, 18 Barb. 320.

(t) See *Martin v. Mayo*, 10 Mass. 137.

(u) *Whitney v. Dutch*, 14 Mass. 457.

it, who however does nothing.(v) So a promise "to pay it as soon as I can make it, but I cannot do it this year; I understand the holder is about to sue it, but she had better not," — was held to be such an affirmation of the contract as would sustain an immediate action; but this case, we think, goes very far indeed.(w) If the promise of the adult be, "All that is justly your due shall be paid," this will sustain an action on the note, and the note will put the defendant to the proof of any injustice of which he would avail himself.(x) Where the adult said he thought the note had been paid in whole or in part, but that his uncle would be there the next month, and the note should then be settled; this went to a jury as evidence of a ratification.(y) But where an adult, who had given his note during infancy, made his will, in which he directed *his just debts* to be paid, it was held that his executors were not liable on the note.(z) So, where the adult admitted that he owed the debt, and said that "the plaintiff would get his pay," but refused to give his note lest he might be arrested, this was held to be no ratification of the original promise.(a) So also, when the adult wrote to the plaintiff, "I consider your claim as worthy my attention, but not as meriting my first attention."(b) And where one offered in writing to return the consideration for which he had given his note while an infant, and added, "If they will not accept of the above offer I will have to pay them, I *suppose*, but I shall do so at my convenience, as it will be nothing less than a free gift on my part"; this clearly was insufficient to avoid the plea of infancy.(c)

It is settled that a mere acknowledgment or part payment will not amount to a ratification.(d) But where an infant gave

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(v) *Orvis v. Kimball*, 3 N. H. 314. And see *Hunt v. Massey*, 5 B. & Ad. 902

(w) *Bobo v. Hansell*, 2 Bailey, 114.

(x) *Wright v. Steele*, 2 N. H. 51.

(y) *Bay v. Gunn*, 1 Denio, 108. -

(z) *Smith v. Mayo*, 9 Mass. 62.

(a) *Hale v. Gerrish*, 8 N. H. 374.

(b) *Wilcox v. Roath*, 12 Conn. 550.

(c) *Dunlap v. Hales*, 2 Jones, N. C. 381.

(d) *Thrupp v. Fielder*, 2 Esp. 628; *Robbins v. Eaton*, 10 N. H. 561; *Smith v. Mayo*, 9 Mass. 62; *Whitney v. Dutch*, 14 Mass. 457; *Thompson v. Lay*, 4 Pick. 48; *Hinely v. Margaritz*, 3 Penn. State, 428; *Benham v. Bishop*, 9 Conn. 330.

a note, and after coming of age he admitted that the transaction was just, and that he had given the payee a watch in part payment, this was held sufficient.(e)

If an adult, after sufficient notice and a reasonable delay and opportunity, continues to retain property which he might restore, and for which he gave, when an infant, his promissory note, this, both on prevailing, though not uniform, authority, and on good reason, we should hold to be conclusive evidence of ratification.(f) But it would be otherwise if the property for which the note was given was disposed of by the infant before he was of age.(g)

Where an adult was sued for necessities received by him while an infant, and he pleaded in bar that he gave his note for the amount; this was very properly held to be a ratification, and in a subsequent action on the note he was not allowed to set up his infancy in bar.(h) We should be willing to admit that a submission to arbitration by the adult of the question whether he was liable or not, did not amount to a ratification,(i) but we

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(e) *Little v. Duncan*, 9 Rich. 55.

(f) In *Aldrich v. Grimes*, 10 N. H. 194, where an infant purchased a potash kettle, irons, leaches, &c., and gave his promissory note for the price, it being agreed by the parties that he might try the kettle and return it, if it did not answer; and the vendor, after the infant became of age, requested him to return it, if he did not intend to keep it; but he retained and used it with the other property a month or two afterwards; it was *held*, that this was a sufficient ratification of the contract, and that an action might be sustained on the note. And see *Robbins v. Eaton*, 10 N. H. 561. So where an infant purchased a yoke of oxen, for which he gave his negotiable promissory note; and after coming of age he converted them to his own use, and received their avails; it was *held*, that this was a ratification of the promise. and that an indorsee of the note was entitled to recover. *Lawson v. Lovejoy*, 8 Greenl. 405. And where an infant purchased land, and gave his note for the purchase-money, and after he became of age continued in possession of the land and promised to pay the note; it was *held*, that this was a ratification of the note. *Armfield v. Tate*, 7 Ired. 258. And where an infant gave his note for a horse, payable to A or bearer, and after he was of age kept the horse and sold him, it was *held* a ratification. *Cheshire v. Barrett*, 4 McCord, 241. In *Thomasson v. Boyd*, 13 Ala. 419, where an infant, ten days before he attained his majority, purchased a note, and gave in payment thereof a bill drawn by him upon a third person; it was *held*, that his omission to return the note or disaffirm the contract, after he was of age, warranted the implication that he intended to abide by the contract, and countervailed the defence of infancy. But in *Benham v. Bishop*, 9 Conn. 330, it was *held*, that the bare retention of the consideration for which the note of an infant was given, after his coming of full age, was not a ratification.

(g) *Thing v. Libbey*, 16 Maine, 55; *Robbins v. Eaton*, 10 N. H. 561.

(h) *Best v. Givens*, 3 B. Mon. 72.

(i) *Benham v. Bishop*, 9 Conn. 330.



should hold the promisor bound by the award of such arbitrators if they decided that he must pay the note. Where one said he owed the payee, but could not pay him, and would try to get his brother to be bound with him, this, although a recognition of the debt, is neither a new promise, nor a ratification, nor confirmation of the note.(j)

The new promise or ratification must be made to the promisee in person, or to his agent authorized to receive it.(k) If made to third parties without interest or agency, or even to one who is an attorney for the promisee in other matters, but not for this purpose, it is not sufficient. l)

If the ratification or new promise is conditional, as "provided I receive a certain legacy," or "if I should succeed to a certain estate," or "if I recover a certain sum of money," or "if I draw a prize in a certain lottery," the plaintiff must show that the condition has happened or been complied with. So if the defendant promised to pay "as soon as he should be able," the plaintiff will be required to show the ability of the defendant; not, however, an ability to pay *without inconvenience*, for evidence that there is property from which the debt might be paid, or an income from some source which would enable the party to pay, would be sufficient.(m)

If the promise be to pay the note in a *particular manner*, as by giving a note of a third person for part, and the balance in money, this, it seems, will be an absolute ratification; and upon failure to comply with such special promise, an action may be brought upon the original note.(n) So if the promise be in the alternative, as, to pay the note in labor within a specified time, or else in money; this is an absolute ratification, and if the labor be not performed within the time specified, an action will lie upon the note.(o)

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(j) Ford v. Phillips, 1 Pick. 202.

(k) Thus, where an individual gave a note during infancy, and after he was of age made declarations to persons, having no interest in or agency as to the note, of an intention to pay it, it was *held*, that such declarations formed no such evidence of a promise of payment or ratification of the contract as would render such person liable. Hoit v. Underhill, 9 N. H. 436. And see Goodsell v. Myers, 3 Wend. 479; Bigelow v. Grannis, 2 Hill, 120.

(l) Bigelow v. Grannis, 2 Hill, 120.

(m) Thompson v. Lay, 4 Pick. 48; Everson v. Carpenter, 17 Wend. 419.

(n) Taft v. Sergeant, 18 Barb. 320; Stokes v. Brown, 4 Chand. 39. See Edgerly v. Shaw, 5 Fost. 514.

(o) Edgerly v. Shaw, 5 Fost. 514.

In England, by the statute of 9 Geo. 4, c. 14, s. 5 (Lord *Tenterden's* Act), it is declared "that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." Under this provision it has been held, (and in this respect the statute has made no alteration,) that any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification.<sup>(p)</sup> But we very much doubt the correctness of this rule. In a later case, a learned judge has more correctly, we think, defined a ratification "to be a consent by a person after he becomes of full age to be liable for a debt contracted during infancy, expressing to the effect that he is willing to affirm it and treat it as valid."<sup>(q)</sup>

If an infant is a member of a firm at the time when a note is given in the name of the firm, the mere fact of his continuing in the firm after he comes of age, without giving any notice of his intention not to be bound by the note, will not amount to a ratification.<sup>(r)</sup> But he will be liable on notes given by the firm after he comes of age, though he has in fact ceased to be a member of the firm, unless he has given notice of this fact.<sup>(s)</sup>

If an infant together with an adult make a joint promissory note, it would seem that in England the payee may bring his action upon it against the adult without making the infant a party defendant.<sup>(t)</sup> But this has been denied in this country.<sup>(u)</sup>

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(p) *Harris v. Wall*, 1 Exch. 122.

(q) *Martin, B.*, in *Mawson v. Blane*, 10 Exch. 206.

(r) *Crabtree v. May*, 1 B. Mon. 289.

(s) *Goode v. Harrison*, 5 B. & Ald. 147.

(t) *Burgess v. Merri'*, 4 Taunt. 468; *Chandler v. Parkes*, 3 Esp. 76; *Jaffray v. Frebain*, 5 Esp. 47.

(u) *Slocum v. Hooker*, 12 Barb. 563, 13 Barb. 536; *Wamsley v. Lindenberger*, 2 Rand. 478.



## SECTION II.

## OF MARRIED WOMEN.

By the common law of England, which is our common law, husband and wife are one person, and the husband is that person; for most purposes the wife's personal existence being merged in that of the husband. This rule is qualified somewhat, in this country, by adjudication; more, however, by recent statutes in several of the States.<sup>(v)</sup> Indeed, the whole law of husband and wife may be said to be in a transition state in this country. The reasons for the old law, most of which depended upon the feudal system, having disappeared, there seems everywhere a willingness, if not an effort, to introduce new principles, better suited to our own times and circumstances. As yet, however, the common law may be said to be generally in force, although everywhere with some qualification.

A married woman cannot legally make, indorse, or accept notes or bills, as acting for herself.<sup>(w)</sup> Nor does a divorce *a mensa et thoro* give her this power at common law; <sup>(x)</sup> but a divorce *a vinculo* wholly annuls the marriage, and all its incidents and disabilities. Nor has her signature any more force because she represented herself to be unmarried.<sup>(y)</sup> Nor if she has eloped, and lives in notorious adultery.<sup>(z)</sup> Nor if she lives apart from her husband, and has a separate maintenance secured to her.<sup>(a)</sup> And in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself. Therefore, where ?

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<sup>(v)</sup> See 1 Parsons on Cont. 306.

<sup>(w)</sup> Barlow v. Bishop, 1 East, 432, 3 Esp. 266; Cotes v. Davis, 1 Camp. 485; Coon v. Brook, 21 Barb. 546; Howe v. Wildes, 34 Maine, 566; Connor v. Martin, 1 Stra. 516, s. c. cited in Rawlinson v. Stone, 3 Wilson, 5.

<sup>(x)</sup> Lewis v. Lee, 3 B. & C. 291. It is otherwise in Massachusetts. Dean v. Richmond, 5 Pick. 461.

<sup>(y)</sup> Cannam v. Farmer, 3 Exch. 698; Lowell v. Daniels, 2 Gray, 161.

<sup>(z)</sup> Hatchett v. Baddeley, 2 W. Bl. 1079.

<sup>(a)</sup> Marshall v. Rutton, 8 T. R. 545; Hyde v. Price, 3 Ves. 437; Lean v. Schuylk, 2 W. Bl. 1195.

married woman signed a promissory note as surety for her husband, and intended to charge her separate estate, but the note contained no words to this effect, it was held that the estate was not liable.(b) Unlike an infant's, her promissory note or bill, made during coverture, is so utterly void, that her promise to pay it, made after her disability has terminated by her husband's death, will not operate as a confirmation, nor have any force, unless made upon a new consideration, so as to be binding as an independent promise.(c) Nor can she, like an infant, convey a good title to a third party by her indorsement.(d) But if she gave a bill or note for money lent while married, and then procured a separate estate, and after her husband's death promised to pay it, it is said this promise will bind her and her executors.(e) A second indorser cannot in an action against him on the bill dispute the legal capacity of the payee to indorse, on the ground that she was a married woman.(f)

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(b) *Yale v. Dederer*, 22 N. Y. 450, 21 Barb. 286. See *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Kirkwall*, 3 Mad. 387.

(c) *Loyd v. Lee*, 1 Stra. 94; *Vance v. Wells*, 6 Ala. 737, 8 Ala. 399; *Littlefield v. Shee*, 2 B. & Ad. 811; *Meyer v. Haworth*, 8 A. & E. 467; *Eastwood v. Kenyon*, 11 id. 438; *Watkins v. Halstead*, 2 Sandf. 311. But see *Coward v. Hughes*, 1 Kay & J. 443; *Franklin v. Beatty*, 27 Missis. 347.

(d) Thus, in *Barlow v. Bishop*, 3 Esp. 266, 1 East, 432, where a promissory note was given by the defendant to a married woman, whom he knew to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she had contracted to him, in the course of carrying on a trade on her own account by the consent of her husband, it was *held*, that the property in the note vested in the husband by the delivery to the wife, and that no interest passed by her indorsement in her own name to the plaintiff. And in *Savage v. King*, 17 Maine, 301, it was *held*, that a note made payable to a married woman is in law a note to the husband, and becomes instantly his property; and her indorsement transfers no property in the note. So where an action was brought by the indorsee of a promissory note, payable to Susan Connor or her order, and given to her before marriage; which note, after her marriage and while covert, she indorsed to the plaintiff; the court were of opinion that the *feme covert* could not assign the note, because by act of law it became the sole right and property of her husband. *Connor v. Martin*, 1 Stra. 516, s. c. cited in *Rawlinson v. Stone*, 3 Wilson, 5. See also *Shuttlesworth v. Noyes*, 8 Mass. 229; *Commonwealth v. Manley*, 12 Pick. 73; *Cotes v. Davis*, 1 Camp. 485. It will be seen, therefore, that there are two reasons why the indorsement of a married woman is void: 1st, Because all contracts and conveyances of a married woman are void on account of her incapacity; 2d, Because a note given to a married woman does not belong to her, but to her husband. But see *infra*, p. 87, note k, for the limitations to this doctrine.

(e) *Lee v. Muggeridge*, 5 Taunt. 36; *Vance v. Wells*, 8 Ala. 399. See *Franklin v. Beatty*, 27 Missis. 347. See 1 Parsons on Cont. 359-361.

(f) *Prescott Bank v. Caverly*, 7 Gray, 217.

A married woman may, however, in this, as in most transactions, act as agent for another, and so she may act for her husband. In that case she should sign, "A (the husband) by B (the wife)." But if she sign "B (the wife) for A (the husband)," this would undoubtedly be sufficient. And if she merely signed her husband's name, without adding anything to show that it was signed by an agent, perhaps the husband would be bound.<sup>(g)</sup> But if she merely sign her own name, without anything to indicate that she is acting in behalf of her husband, this presents a still more doubtful question. Indeed, we are not aware that it has ever been held, in the absence of any subsequent ratification, or other special circumstances, that such a signature would bind the husband. Where a wife indorsed a note in this form, it was held that it did not pass the husband's interest, although the note was in form payable to the wife.<sup>(h)</sup> And where a husband authorized his wife to purchase a piece of land and "give notes for the purchase-money," and the wife purchased the land and gave a note for a part of the purchase-money, signed with her own name merely, it was held that the husband was not liable on the note.<sup>(i)</sup>

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<sup>(g)</sup> We are not aware that this point has ever been expressly decided. The recent case of *Wood v. Goodridge*, 6 Cush. 117, contains some well-considered *dicta* against the validity of such a signature. The precise question was raised in *Shaw v. Emery*, 38 Maine, 484; but it was unnecessary to decide it, there having been a subsequent ratification by the husband. See 1 Parsons on Cont. 95-97. We shall advert to this point again when we come to speak of agents.

<sup>(h)</sup> *Barlow v. Bishop*, 1 East, 432. This was an action against the maker of a promissory note, made payable to one Ann Parry or order, and by her indorsed to the plaintiff. It appeared that Ann Parry was a married woman, carrying on trade at Birmingham in her own name, with the consent of her husband; and that the plaintiff, who lived in London, had furnished her with goods to the amount of the note, dealing with her as a *feme sole*; that the plaintiff, after much delay, having pressed for payment, the defendant, with a view to serve Mrs. Parry, gave her the note in question with knowledge of her being married, and with a view that she should pay it over to the plaintiff, in order to stop his proceedings against her, which she did by indorsing it over to him. It was *held*, that the plaintiff could not recover. Lord *Kenyon* said: "It is clear that the delivery of the note to the wife vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, I am not prepared to say that that would not have availed; as many acts of this nature may be done by a power of attorney; and the jury might have presumed what was necessary in favor of an authority from her husband for this purpose. But the indorsement being in her own name, it is quite impossible to say that she could pass away the interest of her husband by it."

<sup>(i)</sup> *Minard v. Mead*, 7 Wend. 68. *Sutherland, J.*, in delivering the opinion of the

But it is a familiar principle, that a man, either in his general dealings or in a particular transaction, may adopt whatever name he chooses, and he will be bound accordingly. If, therefore, a husband should put his wife's name to a note given on his own account, he would be considered as having adopted his wife's name *pro hac vice*, and would be liable on the note. Upon the same principle, if the husband clearly authorizes his wife to give notes on his account and sign her own name, and she does so, he will be liable.(j) Therefore, if the wife executes a note for her husband, in his presence, and signs her own name merely, with his knowledge and consent, he will be bound.(k) So, if the

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court, said : " The note was not so executed as to bind the defendant. It was signed with the name of the wife, without any reference whatever, either in the body or signature, to the defendant, and without purporting to be signed by her as the agent of, or on behalf of, her husband. Nothing but proof of a special authority from the husband to the wife to sign in that manner would make the instrument the note of her husband. Her authority as agent merely was to give a note in the name of her husband. If an agent signs his own name, instead of the name of his principal, as a general rule the principal will not be bound."

(j) *Cotes v. Davis*, 1 Camp. 485. This was an action by the indorsee against the maker of a promissory note, payable to " Mrs. Carter or order," and indorsed by her in her own name. Mrs. Carter was a married woman. It was proved that when the note was presented for payment by a notary, with the indorsement upon it, the defendant said it should be paid in a few days ; and that he afterwards asked for further time, when the action was commenced and the declaration had been delivered. Upon these facts, *Garrow*, for the defendant, contended that no title to the note passed by the indorsement. But Lord *Ellenborough* said : " The husband may authorize the wife to indorse bills of exchange or promissory notes as his agent ; and, after the acknowledgments and promises of the defendant in this case, it may reasonably be presumed against him, that Mrs. Carter had authority from her husband to indorse the note in question." *Garrow* : " But in that case, the indorsement ought to have been in the name of the husband." Lord *Ellenborough* : " We may fairly carry the presumption one step further, and presume that the husband authorized her to indorse notes in the name by which she herself passed in the world. The defendant is now estopped from contesting her authority for this indorsement." And see *Prestwick v. Marshall*, 7 Bing. 565 ; *Prince v. Brunatte*, 1 Bing. N. C. 435 ; *Lindus v. Bradwell*, 5 C. B. 583 ; *Stevens v. Beals*, 10 Cush. 291 (disapproving *Savage v. King*, 17 Maine, 301) ; *Hancock Bank v. Joy*, 41 Maine, 568.

(k) *Prestwick v. Marshall*, 7 Bing. 565. This was an action on a bill of exchange drawn by Lydia Bickerstaff, accepted by the defendant, and indorsed by Lydia to the plaintiff. It appeared that the drawer of the bill was a married woman, and kept a school, at which the defendant had placed his daughter. The bill in question was accepted by the defendant, at the request of Mrs. Bickerstaff's husband, for the expense of his daughter's education. The bill was drawn by the husband, and signed and indorsed by the wife in his presence ; and it was put in that form at the defendant's request, he considering that his engagement was with the wife rather than the husband. The bill was afterwards negotiated to the plaintiff by the husband. The court *held*,

wife signs in this form, and afterwards the husband, upon being informed of it, ratifies and confirms the act, this will be equivalent to a prior authority to sign in this form, and will bind him.<sup>(1)</sup> And it should seem, that if the husband carries on

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that the plaintiff was entitled to recover. The same point was decided in *Menkens v Heringhi*, 17 Misso. 297.

(1) This was expressly decided, after much consideration, in *Lindus v. Bradwell*, 5 C. B. 583. There a bill of exchange addressed to the defendant by the name of "William Bradwell" (his true name being William David Bradwell) was accepted by his wife, by writing across it her own name, "Mary Bradwell." There was no evidence of any express authority in the wife so to accept the bill; but on its being presented to the husband after it had become due, he said he knew all about it, that the bill was a millinery bill (for which the husband appeared to be liable), and that he would pay it very shortly. *Held*, that he was liable as acceptor. *Maule, J.* said: "I think the defendant is bound by the acceptance of his wife. The evidence of Henry Lindus shows that the defendant represented himself to be a person bound by the bill, after his attention had been particularly called to it. He says he knows all about it, that it is accepted by his wife, and mentions the particular transaction out of which it grew, and promises to pay it shortly. The irresistible inference from this is, that he considers the bill as one that he is liable to pay. He, in effect, says that his wife was authorized by him to accept this particular bill in the way she did. At any rate, the conversation fairly admits of that inference. He sees that his wife has written her own name across the bill, and recognizes it as done by his authority. The question is, whether it is competent to a man to give his wife such an authority. *Cotes v. Davis*, a case that has been since recognized, seems to be a strong authority upon the subject. But, upon principle, it seems to me that there is no objection to the plaintiff's recovering upon this bill. The acceptance is in writing, and therefore satisfies the statute 1 & 2 Geo. 4, c. 78. If a man says to his wife, Accept such a bill drawn upon me, in your name, unless he intends to be bound by that, he means nothing. Unless such an acceptance operates to charge him, it has no operation at all. The defendant clearly meant to bind himself, if, in point of law, he could do so. It is said that a drawee cannot bind himself otherwise than by writing his name on the bill. But suppose the drawee, with his own hand, accepts the bill by writing another name across it, will he not be liable? Here the defendant has, by the hand of his wife, written 'Mary Bradwell' on the bill. If he had done that with his own hand, it clearly would have been his own acceptance; and I know of no rule of law that makes such an authority void. It is difficult to say, that, if the defendant had written his true name, William David Bradwell, across the bill, that would not have been an acceptance that would bind him; and yet, inasmuch as that would not be the name in which it was addressed, if the argument of the defendant's counsel is well founded, he would not be liable. I admit that nobody but the defendant could accept this bill, so as to charge him; but he has accepted it by the hand and in the name of his wife; and that, I think, is a sufficient acceptance to bind him." *Cresswell, J.* said: "The jury must be assumed to have found here, that the wife had authority to accept this bill; and as the defendant, by his subsequent conduct, showed that he was satisfied with the mode in which the authority had been exercised, we must likewise assume that the jury also found that he authorized her to bind him in that particular way. It is by no means an unusual thing for a bill of exchange to be drawn upon persons trading under a style that corresponds with the name of no one member of the existing firm; and yet bills so drawn and so accepted are perfectly

business generally in his wife's name, and authorizes her to give notes for him in the course of such business, this will render him liable on notes so given, and signed with the wife's name.(*m*) And if a woman holds a note at the time of her marriage, and afterward indorses it in her maiden name, this will pass the interest of the husband, if the circumstances of the case be such as to warrant the presumption that the indorsement was so made with his authority and assent.(*n*)

In order to hold the husband on a bill or note executed by his wife as his agent, the wife's authority must be very clearly proved.(*o*) It will not be sufficient, it seems, to show that the wife carried on trade or business, and purchased goods on credit, with the knowledge and consent of her husband. For he may be willing to be answerable for the price of goods purchased on credit by his wife, for the purpose of carrying on the business in which she is engaged, so long as it is done in such a manner that he, if she be defrauded or imposed on in the purchase of the goods, shall not be precluded from showing the fact, as a defence against the payment for them. But if she be allowed to purchase goods on credit, and give negotiable bills or notes for the payment of them, he loses this protection. For the moment that such paper comes into the hands of a *bona fide* holder for value, the husband becomes absolutely bound for the payment of it at maturity, however fraudulent the transaction may be for and on account of which the paper was given.(*p*) And though a tradesman cannot write, and his wife write for him whatever is requisite in his trade, he will not be liable on a bill or note signed by her in his name, unless there is some evidence that it was signed by her in respect of his trade.(*q*) If a husband authorize his

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good. So here, the bill having been accepted, and in this form, by the authority of the defendant, he is clearly liable upon it."

(*m*) *Abbott v. Mackinley*, 2 Miles, 220.

(*n*) *Miller v. Delamater*, 12 Wend. 433.

(*o*) *Goldstone v. Tovey*, 6 Bing. N. C. 98.

(*p*) *Reakert v. Sanford*, 5 Watts & S. 164. See *Krebs v. O'Grady*, 23 Ala. 726.

(*q*) *Smith v. Pedley*, Bayley on Bills, 2d Am. ed., p. 42. In an action by the indorsee of a note against defendant as maker, it appeared that defendant could not write, that his wife wrote for him whatever was requisite, and that this note was signed by the wife in his name; but there was no evidence that the note was given on account of any concerns of the husband; it was, however, left to the jury to presume it was given for the husband's concerns; and the jury found for the plaintiff. But on a rule *nisi* for a new trial, the court thought there was nothing to warrant such presumption by the jury, and a new trial was granted.



wife to draw, accept, and indorse bills in his name, she cannot delegate this authority to another. *Delegatus non potest delegare*. But she may direct another person to write her husband's name for her, in her presence.(*r*)

Although a note given by a wife to her husband is of itself altogether void, yet if the husband indorse it over, it is valid as between this or a subsequent indorsee and the husband.(*s*)

A woman may, under some circumstances, be a sole trader. As if her husband is an alien, and has not been in this country.(*t*) Or if imprisonment for crime or desertion have restored to her, *quasi*, the rights of a single woman.(*u*) The rule on this point

(*r*) Lord *v. Hall*, 8 C. B. 627. In this case, upon an issue as to the indorsement of a promissory note by J. S., it was proved that the wife of J. S. had the general management of his business; that she was in the habit of drawing, accepting, and indorsing bills and notes in his name; and that the name of J. S. was indorsed upon the note in question by his daughter, by the direction and in the presence of her mother, by whom the note was afterwards handed to the plaintiff. *Held*, that it was a question of fact for the jury, whether the indorsement so made was within the scope of the wife's authority; and that the evidence warranted them in concluding that it was.

(*s*) *Haly v. Lane*, 2 Atk 181. See *Knox v. Reeside*, 1 Miles, 294.

(*t*) *Kay v. Duchesse de Pienne*, 3 Camp. 123. See 1 Parsons on Cont. 306, n. (*e*). In *M'Arthur v. Bloom*, 2 Duer, 151, the defendant, being sued as the maker of two promissory notes, pleaded coverture. It appeared that she was a native of Prussia, but had lived in New York for more than seven years; and during that time had carried on business in her maiden name, as a *feme sole*. It also appeared that her husband, to whom she had been married more than twenty years, had continued to live in Prussia, and by the law of that country could not leave the kingdom without the express permission of the government. *Held*, that the defendant, under these circumstances, might justly be considered and treated as a *feme sole*, and that the plaintiffs were therefore entitled to recover. *Campbell, J.* said: "It would be difficult to distinguish this case from that of *Gregory v. Paul*, 15 Mass. 31, except in that case it appeared that the husband had deserted the wife in England, while in this case the reasons of the separation, and of the wife assuming her maiden name, do not appear. There is in the case before us, however, another fact, which may be considered of importance. It is, that, by the laws of Prussia, a passport or permit is required to enable a subject of that country to emigrate. It may be that such permit would not be given to the husband, and thus the case would be brought within the rule of many of the English cases, as well as the principle upon which the rule was founded. Thus, when the husband was an alien enemy residing abroad, the wife was always treated as a *feme sole*, because it might well be that he would not be permitted to come into the country where she resided. So, when the husband was transported, even though for a limited period, the wife was also treated as a *feme sole*, as the husband might not be permitted to return, or might be disposed never to return, even after his term of banishment had expired. In such cases, it is said that it is greatly for the interest of the wife that she should be treated and considered as a *feme sole*, or otherwise she could neither sue nor be sued; could neither enforce her rights, nor obtain the credit which might be necessary, in order to enable her to make a support for herself."

(*u*) See 1 Parsons on Cont. 306, n. (*e*).

may not be well settled in this country, where we have no "custom of London"; but the cases in our notes will show in what way our courts have dealt with this question.(v) In some of the States, by statute, married women may trade as, and have many or all the rights of, *femes sole*.(w)

If a bill or note be given by a single woman who afterwards marries, the husband is liable upon it, and they should be sued jointly.(x) But if she dies before a judgment is obtained for the debt, the husband is no longer liable *as such*; but her representatives are liable.(y)

Bills and notes possessed by a single woman before and at her marriage are her choses in action, which the husband *may* reduce to his possession and so make his own, or *may* not. If he does not, and dies, her right and interest to or in them are the same as before marriage.(z) If she dies, they are now assets in the hands of her administrator; the husband has a right to be her administrator; and having in that capacity collected the notes or bills, he will retain the proceeds for his own benefit and as his own property.(a) And if he dies,

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(v) In Pennsylvania and South Carolina a wife may become a sole trader, and become liable *as such*, in imitation of the custom of London. See 1 Parsons on Cont. 306, note *d*; *Wilthaus v. Ludcus*, 5 Rich. 326. In *Gregory v. Pierce*, 4 Met. 478, the court declared, that if there be a complete and absolute desertion of the wife by the husband by his continued absence from the Commonwealth, and a voluntary separation from, and abandonment of, his wife, with an intent to renounce *de facto* the marital relation, and leave her to act as a *feme sole*, this will enable her to sue, and render her liable to be sued, as a *feme sole*. But in *Chouteau v. Merry*, 3 Misso. 254, where the husband abandoned his wife in the State of Missouri, in 1821, and voluntarily left that State and established himself in Arkansas Territory, where he continued to reside, it was *held*, that the wife, who continued to reside in the State of Missouri, was not liable on a note given by her there in 1831. The court said: "Coverture operates a legal disability to contract, and all contracts of a *feme covert* are absolutely void. The facts in this case do not bring it within any of the exceptions. The cases cited from the English books are where the husbands abjured the realm, or were foreigners residing abroad. The principles settled in those cases do not apply. If by a removal from one State to another, or a separate residence in different States, the indissoluble connection by which the wife is placed under the power and protection of her husband could be cancelled, and the parties thereby relieved of their respective liabilities and disabilities, there would be little need of troubling the legislature or the courts on the subject of divorces." See *Bean v. Morgan*, 4 McCord, 148.

(w) See the statutes on this subject collected in 1 Parsons on Cont. 306, note.

(x) *Mitchinson v. Hewson*, 7 T. R. 348.

(y) *Ibid*.

(z) 1 Parsons on Cont. 285, note *r*.

(a) 1 Parsons on Cont. 285, note *s*.



the right of taking out letters of administration upon her unsettled estate goes to his next of kin, and not to hers.(b) If she leaves debts contracted when single, for which the husband is no longer liable *as such*, he is still liable as her administrator to the extent of her bills or notes or other choses in action which he has reduced to possession after her death; but not for those which he reduced as husband, while she lived.(c)

It has been held, that if he gets actual possession of her unreduced choses in action after her death, without taking out letters of administration, they are then his property. There are, however, some legal, although perhaps only technical, objections to this doctrine.(d)

What is a reduction to possession of the wife's bills and notes is not quite so certain. We should say, any act which distinctly manifested a purpose of making them his own; as collecting a note, or demanding payment, or indorsing, or assigning it.(e) But we should also say, that either of these acts might be so done, and accompanied with such declarations or other acts, as to leave the property still the wife's. And even if the husband collected the money, but collected it for her, and immediately invested it, in good faith, in other choses in action in her name, we should say on principle that these new choses in action would stand in the same right, and be subject to the same rules of law, as did the bills or notes.(f)

Bankruptcy is not a reduction to possession; nor, it seems, can a creditor of the husband obtain possession of the bills or notes of the wife without the co-operation of the husband.(g) The cases on the subject of a transfer by the husband are in some conflict. Perhaps the weight of authority may be, that if a husband transfers unreduced choses in action, or gives

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(b) 1 Parsons on Cont. 285, note u.

(c) 1 Parsons on Cont. 285, note s.

(d) Whitaker v. Whitaker, 6 Johns. 112; 1 Parsons on Cont. 285, note t.

(e) Scarpellini v. Atcheson, 7 Q. B. 864; Tuttle v. Fowler, 22 Conn. 58.

(f) See, to that effect, Stanwood v. Stanwood, 17 Mass. 57; Phelps v. Phelps, 20 Pick. 556; Adams v. Brackett, 5 Met. 280; Fisk v. Cushman, 6 Cush. 20; Wilder v. Aldrich, 2 R. I. 518; Marston v. Carter, 12 N. H. 159; Poor v. Hazleton, 15 id. 564.

(g) Yates v. Sherrington, 11 M & W. 42, 12 id. 855. And see Marston v. Carter, 12 N. H. 159; Poor v. Hazleton, 15 id. 564. But see Shuttlesworth v. Noyes, 8 Mass. 229; Hayward v. Hayward, 20 Pick. 517; Smith v. Chandler, 3 Gray, 392.

authority to a third person to collect them for that person's own benefit, and such transferee or agent proceeds to collect the same, and completes this while the husband lives, he has the property. But if the husband dies before the collection and reduction are consummated, the wife's rights revive. On principle, we should say that the actual transfer of a chose in action is an actual or a constructive reduction to possession, and is complete as soon as made, whether the husband lives or dies. But that the right of reducing is strictly marital, and cannot be transferred by a husband; that such agent, therefore, acts only for him, and has no interest in the property, unless the husband actually transfers the property in the chose in action to him, or confirms him in the possession of the proceeds, and that such agency is therefore terminated by the death of the husband.<sup>(h)</sup> The receipt of interest is not necessarily a reduction to possession; nor is, it seems, a receipt of a part of the principal.<sup>(i)</sup>

If a bill or note is given to a married woman, the property in it is her husband's, so that he alone can indorse it.<sup>(j)</sup> But if he does not reduce it to possession, it belongs, at his death, to his wife, and not to his executors; and she, and not they, must sue it, or may indorse it.<sup>(k)</sup> It has been thought that,

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(h) 1 Parsons on Cont., 4th ed., 285, note *va*.

(i) *Hart v. Stephens*, 6 Q. B. 937; *Nash v. Nash*, 2 Mad. 133. In this last case the father of a married woman drew a check in her favor upon his bankers for £10,000. The bankers gave her a promissory note for the £10,000. Afterwards, £1,000, part of the principal money due on the note, was paid to her husband; and he also received the interest due on the note up to the time of his death. *Held*, that, upon the husband's death, the wife was entitled to the note as a chose in action which had survived to her.

(j) *Mason v. Morgan*, 2 A. & E. 30. And see *supra*, p. 79, note *d*.

(k) This was settled in Massachusetts, upon great consideration, in *Draper v. Jackson*, 16 Mass. 480. And see *Hayward v. Hayward*, 20 Pick. 517; *Phelps v. Phelps*, 20 Pick. 556. The same point was decided in England in the case of *Gaters v. Madeley*, 6 M. & W. 423. And *Parke, B.*, in delivering the opinion of the court, said: "When a chose in action, such as a bond or note, is given to a *feme covert*, the husband may elect to let his wife have the benefit of it, or if he thinks proper he may take it himself; and if, in this case, the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may if he pleases leave it as it is, and in that case the remedy on it survives to the wife, or he may, according to the decision in *Philliskirk v. Pluckwell*, 2 Maule & S. 393, adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the

if the husband's money were the consideration of the note, the wife should be held trustee for the husband's representatives.<sup>(l)</sup> But we think it would remain hers, if the husband, being solvent, intended in good faith that it should be her chose in action.<sup>(m)</sup> The husband, on such a note, may sue alone,<sup>(n)</sup> or may join the wife; <sup>(o)</sup> if he sue alone, debts due from him may be set off; if he join the wife, it seems that debts due from her before marriage may be set off.<sup>(p)</sup>

If a bill or note be given to a wife for her separate use, and the consideration be her distributive share in an intestate estate, it becomes, as it is said by the common law, the property of the husband.<sup>(q)</sup> That it would be so, so far that he alone could indorse, we should readily admit; yet we cannot but doubt whether it becomes at once the property of the husband, in the sense of a chose in action reduced to possession.

A bill being drawn payable to a wife, and the husband suing the drawer, the defendant cannot object that the wife had no

note, as the judgment would survive to her." This doctrine, therefore, is not inconsistent with that stated *ante*, p. 79, note *d*. See further, *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 id. 864; *Howard v. Oakes*, 3 Exch. 136; *Guyard v. Sutton*, 3 C. B. 153; *Wilder v. Aldrich*, 2 R. I. 518; *Poor v. Hazleton*, 15 N. H. 564.

<sup>(l)</sup> In *Gaters v. Madeley*, *supra*, *Parke*, B. said: "Whether the executor of the husband, where the money advanced was his, could compel an account from the executor of the wife, who recovered on the note, by a bill in equity, is another matter, with which, in a court of law, we have nothing to do, and which could make no difference in this case, as it would not vary the right of action on the note." In *Draper v. Jackson*, *supra*, where the consideration of the note was the sale of real estate belonging to the wife, *Jackson*, J. said: "In considering this question, we except the case of a voluntary gift by the husband to his wife; as when he advances his own money or other property, and takes for it a note or bond to himself and his wife. This, like every other voluntary conveyance, would, without doubt, be void as against the creditors of the husband. But when no such fact appears, and especially when, as in the present case, the contrary appears, the law seems to require that the wife shall have the note or bond, if she survives." And see *Adams v. Brackett*, 5 Met. 280; *Guyard v. Sutton*, 3 C. B. 153.

<sup>(m)</sup> See preceding note. And see cases cited *supra*, p. 86, note *f*.

<sup>(n)</sup> *Barrough v. Moss*, 10 B. & C. 558; *Sutton v. Warren*, 10 Met. 451. And in *McNeilage v. Holloway*, 1 B. & Ald. 218, where a bill of exchange was payable to a *feme sole*, who intermarried before the same was due, it was *held*, that the husband might sue in his own name, without joining the wife, although the latter had not indorsed the bill. But see, as to this case, *Richards v. Richards*, 2 B. & Ad. 447; *Gaters v. Madeley*, 6 M. & W. 423; *Hart v. Stephens*, 6 Q. B. 937.

<sup>(o)</sup> *Philliskirk v. Pluckwell*, 2 Maule & S. 393.

<sup>(p)</sup> *Barrough v. Moss*, 10 B. & C. 558.

<sup>(q)</sup> *Commonwealth v. Manley*, 12 Pick. 173.

right to demand payment of the drawee, and that consequently there has been no legal demand or presentment. (r)

Where a wife lent to her husband and two others money which belonged to her as administratrix, taking their joint note, it was held that she could not sue this note while the husband lived, but might sue the other parties after his death. (s) But a note given by the husband alone to the wife during coverture is void, although the consideration was money belonging to the wife at the time of their marriage. Consequently, the wife cannot maintain an action on the note, after her husband's decease, against his executor. (t)

Where a note secured by mortgage was made to husband and wife to secure the purchase-money of land belonging to the wife, the husband dying, the note and mortgage went to the wife, and not to his administrators. (u)

Payment to a married woman of a sum due on a note to her will not discharge the party making it, unless the payment were authorized by the husband. (v)

There are some rules or principles in relation to indorsement and acceptance when made by a married woman, or of a note or bill to a married woman, which we shall consider when we treat, in a later chapter, of indorsement and acceptance specifically.

### SECTION III.

#### OF PERSONS UNDER GUARDIANSHIP.

THESE are either infants, of whom we have already spoken, or those who are under guardianship under our State statutes, as spendthrifts, drunkards, &c., or the insane. Generally these statutes make such persons incapable of entering into contracts. (w) If their guardians or trustees sign notes for them, affixing to their names their office, as "A. B., guardian," they are neverthe-

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(r) *Cathell v. Goodwin*, 1 Harris & G. 468.

(s) *Richards v. Richards*, 2 B. & Ad. 447.

(t) *Jackson v. Parks*, 10 Cush. 550; *Sweat v. Hall*, 8 Vt. 187.

(u) *Draper v. Jackson*, 16 Mass. 480.

(v) *Byles on Bills*, 6th ed., p. 51.

(w) *Smith v. Spooner*, 3 Pick. 229; *Manson v. Felton*, 13 Pick. 206. See *Chew v. Bank of Baltimore*, 14 Md. 299.

less held personally. (x) One reason is, that the note would otherwise be inoperative, as the guardian cannot bind by such an instrument the person or the property of his ward. Another is, that it is still the promise of the signer, and the name of his office is but a part of his description. Undoubtedly he may secure himself from personal liability by saying that he promises to pay out of the ward's estate, and only if that be sufficient. But such an instrument would not be a regular promissory note. In a late case, where the guardian sold property of minors, and took notes payable to his order as guardian, it was held that an indorsement by him passed the title to a person who received for value and in good faith, the words guardian, &c. being merely words of description. (y)

## SECTION IV.

### OF AGENTS.

A MAN may do by his agent whatever he can do himself, and his agent can do for him. (z) And any person can be the agent of another, who is physically and mentally capable of executing the agency. At least the common personal disabilities do not

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(x) In *Thacher v. Dinsmore*, 5 Mass. 299, where one gave a negotiable note, as guardian to an insane person, it was *held*, that he was liable in his individual capacity, after his guardianship was discharged. *Parsons*, C. J. said: "If an action is maintainable against any person, it must be the defendant; for the guardian of an insane person cannot make his ward liable to an action as on his own contract, by any promise which the guardian can make. Neither can the defendant be sued in his capacity of guardian, so as to make the estate of his ward liable to be taken in execution; for the judgment is not against the goods and estate of the ward in his hands, but against himself. A creditor may sue the insane person, who shall be defended by his guardian, and in that case, judgment being against the insane person, it may be satisfied by his property. The defendant's description of himself in the notes as guardian cannot vary the form of the action; but it is for his own benefit, that, on payment of the notes, he may not be precluded from charging the moneys paid to the account of his ward. If the defendant, therefore, was ever liable to this suit, he must continue liable, notwithstanding the discharge of the guardianship; for by that the plaintiff's rights cannot be affected, whose claim is on the defendant personally, and not on his official character." *Forster v. Fuller*, 6 Mass. 58, and *Robertsons v. Banks*, 1 Smedes & M. 666, are to the same effect.

(y) *Thornton v. Rankin*, 19 Misso. 193.

(z) *Combes's Case*, 9 Rep. 75.

incapacitate one from acting as agent, as infancy or coverture. (a) Nor is any particular form or mode of appointment necessary, nor any especial way of executing the agency, other than that which the authority itself designates.

It seems formerly to have been held, that only the formal execution of an instrument in the name of the principal by the agent, sufficed. And this is still the more correct way. A, being the agent of B, should sign any paper which he executes as B's paper, "B by A," and not "A for B." In the first case the execution is B's, by his instrument A; in the other it is A's, for his employer B; or in other words, the technical rule was, that in the first case it was B's promise by A, and in the latter, A's promise made at the request of B. Now, however, it seems to be well settled, that the actual intent of the parties, if it is obvious and certain, prevails over this distinction, and determines whether the act was that of the principal or of the agent. (b)

It seems to be common among commercial men, at least in England, for an agent, as A, to sign "A by procuration of B," where B is the principal. But this is inaccurate; for it might import that B was the agent, signing by procuration for A the principal. (c)

It has been doubted whether a note, executed by an agent by signing the name of the principal merely, without adding anything to indicate that the signature was by an agent, would be binding on the principal. (d) Undoubtedly there are grave ob-

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(a) Co. Litt. 52 a.

(b) See 1 Parsons on Cont. 47, note x.

(c) See note to Davidson v. Stanley, 2 Man. & G. 721.

(d) Wood v. Goodridge, 6 Cush. 117. This was the case of a mortgage deed and note made under a power of attorney under seal, by simply signing the name of the principal opposite to a seal in the case of the deed, and in the case of the note by simply writing the principal's name at the foot. It was not necessary to decide the point, the court being of opinion that the power, though very general in its terms, did not confer authority to mortgage, nor to borrow money and bind the principal by a promissory note. But the question of the manner of execution was much considered, and upon that point *Fletcher*, J. said: "It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear by the instruments themselves, which he executes, that he intends to execute this authority. The instruments should be made by the attorney, expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney or whatever may be his oral declaration or profession at the time, he does

jections to such a mode of execution, and it ought never to be adopted; but still we think it would be valid, and the agent's authority might be shown by parol.(e)

It is conceded, that if the name of the principal is signed by an agent in the presence of the principal and by his direction, this will be sufficient to bind the principal, though there be nothing on the face of the note to show the agency.(f)

If the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable on the note, and the principal will not be liable.(g) And although it could be proved that the agency was disclosed to the payee when the note was made, and that it was the understanding of all parties that the principal,

not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is, that the attorney shall execute the deed as attorney, but in the name of the principal." See *ante*, p. 80, note g; 1 Parsons on Cont. 96, note gg.

(e) This appears to have been regarded as clear in several cases, which have never been questioned. Thus, in *Neal v. Erving*, 1 Esp. 61, it was *held*, that where one person subscribed a policy of insurance with the name of another, proof of his having done it in many instances is sufficient to charge him whose name is so subscribed, without producing any power of attorney. So also, in *Watkins v. Vince*, 2 Stark. 368, it was *held*, that evidence that the son of the defendant had, in three or four instances, signed bills of exchange for his father, is sufficient, in an action against the father on a guaranty, to warrant the reading of an instrument purporting to be a guaranty by the father in the handwriting of the son. And see *Llewellyn v. Winckworth*, 13 M. & W. 598; *Cash v. Taylor*, Lloyd & W. Merc. Cas. 178; *Barber v. Gingell*, 3 Esp. 60; *Brigham v. Peters*, 1 Gray, 139. It may be added, that Sergeant *Manning* (a very high authority), speaking of the manner in which an agent should sign, says: "The proper mode of signing by procuration is, either to use the name of the principal only, or to sign, 'A. B. (the principal), by, or by the procuration of, C. D. (the agent).'" See the note to *Davidson v. Stanley*, 2 Man. & G. 721.

(f) This was decided in *Morse v. Green*, 13 N. H. 32. And the rule is there stated in general terms, that if the defendant have authorized another to subscribe his name to a note, the fact that the signature was placed there by an agent need not appear on the face of the note; and parol evidence is admissible to prove that the name of a person who appears to be one of the makers of a note was not written by him, but by another person by his direction; as such evidence neither limits nor enlarges the terms of the contract. And see *Wood v. Goodridge*, *supra*; *Haven v. Hobbs*, 1 Vt. 238.

(g) There is an apparent (but only apparent) exception to this rule, when the principal carries on business in the name of an agent. In that case, the name of the agent is the name of the principal, *pro hac vice*. *Bank of Rochester v. Monveath*, 1 Denio, 402.



and not the agent, should be held, this will not generally be sufficient, either to discharge the agent, or to render the principal liable *on the note*.<sup>(h)</sup> But the principal will be liable, under such circumstances, on the original consideration for which the note was given.<sup>(i)</sup> And there may be cases in which the agent

(h) See 1 Parsons on Cont. 48, note a. This principle was established upon much consideration in the leading case of *Stackpole v. Arnold*, 11 Mass. 27. That was an action against the defendant as maker of three promissory notes. The notes were signed by another person in his own name, and there was nothing on the face of them to indicate any agency, or that the defendant had any connection with them. At the trial, the person who signed the notes testified that they were given for premiums upon policies of insurance procured by him in the office kept by the plaintiff, at the request and for the use of the defendant, on property belonging to him; and that the witness acted merely as the factor of the defendant, and intended to bind him by the premium notes. The judge instructed the jury, that, "if they believed the notes to have been made and signed for and in behalf of the defendant, their verdict ought to be for the plaintiff." It was *held*, that the evidence was improperly admitted, and the instruction was erroneous. The same principle was reaffirmed in *Bedford Com. Ins. Co. v. Covell*, 8 Met. 442, and *Taber v. Cannon*, 8 Met. 456, though the facts in these cases were not so strong. In *Bedford Com. Ins. Co. v. Covell*, the plaintiffs, on the application of S., who was C.'s agent, caused "S. for C. to be insured on ship G.," and S. gave the plaintiffs a promissory note for the premium, signed by himself alone, without mentioning his agency, and charged the premium in account with C., and had it allowed. S. was afterwards declared bankrupt, and the plaintiffs proved their note as a claim against him, and received a dividend upon it. *Held*, that the plaintiffs could not maintain an action against C. to recover the balance of the note. In *Taber v. Cannon*, A, who was authorized, as agent, by the owners of a whale-ship, to fit her for sea and purchase supplies for her voyage, bought the supplies of B; B drew a bill of exchange for the amount of the supplies, payable to his own order, and addressed "to the agent and owners" of the ship. A accepted the bill by writing his name thereon, without any addition indicating his agency. *Held*, in a suit by an indorsee of the bill against the owners of the ship as acceptors, that, admitting the authority of A to bind them by accepting for them as their agent, yet he had not bound them by the acceptance as made, and that he alone was liable as acceptor. The same rule is well settled in England. Thus, in *Thomas v. Bishop*, 2 Stra 955, a bill was drawn upon the defendant, as "Cashier of the York Buildings Company." The defendant accepted the bill by simply writing his own name. It was *held*, that he was liable as acceptor. The court said: "A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. Now here is nothing in writing to bind the company, nor can any action be maintained against them upon the bill; for the addition of cashier to the defendant's name is only to denote the person with more certainty." See *Shelton v. Darling*, 2 Conn. 435, and *post*, p. 102, note b.

(i) *Pentz v. Stanton*, 10 Wend. 271; *Emerson v. Providence Hat Manuf. Co.*, 12 Mass. 237; *Melledge v. Boston Iron Co.*, 5 Cush. 158. But where a party, dealing with an agent, takes his promissory note, with a full knowledge of his agency and of the liability of the principal for the debt for which the note is given, he thereby discharges the principal; so that he cannot maintain an action against him for the original debt. *Paige v. Stone*, 10 Met. 160; *Hyde v. Paige*, 9 Barb. 150; *Ranken v. Deforest*, 18 Barb. 143.



would not be personally liable on the bill or note, though there should be nothing on the face of the instrument to indicate the agency. Thus, if an agent, in the execution of his agency, incurs a debt on behalf of his principal, and draws upon his principal a bill for the amount thereof, in favor of the creditor, it has been held, that the agent will not be liable on the bill, if it was the understanding of the parties that he acted as agent merely, and did not intend to make the debt his own. The principal object of drawing the bill, in such case, is to certify to the principal the amount due the creditor; and the agent may, it seems, defend on the ground of a want of consideration.(j) Of course this will not apply to a subsequent *bona fide* holder without notice. And if an agent draws a bill on a third person in his own name, but there is sufficient on the face of the instrument to inform the drawee that he is to pay the amount on account of the principal, and not on account of the drawer, the drawee, having paid the bill, will not be entitled to maintain an action for money paid against the agent. Thus, where the agent of the owners of a steamboat drew a bill in his own name, and directed the drawee to charge the amount "to account of steamer Walter Scott," it was held that the agency of the drawer was apparent on the face of the bill, in consequence of this direction, which negatived the idea that he was to be personally bound.(k)

It has indeed been held, that whenever it is doubtful from the face of a bill or note whether it was intended to operate as the personal engagement of the party signing it, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true nature of the transaction.(l) The

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(j) *Roberts v. Austin*, 5 Whart. 313, 2 Miles, 254; *Krumbhaar v. Ludeling*, 3 Mart. La. 640; *Wolfe v. Jewett*, 10 La. 383; *Lincoln v. Smith*, 11 La. 11. But see *Mayhew v. Prince*, 11 Mass. 54; *Newhall v. Dunlap*, 14 Maine, 180; *Sowerby v. Butcher*, 2 Crompt. & M. 368. In *Hicks v. Hinde*, 9 Barb. 528, where an agent drew a bill on his principal for a debt due from the principal to the payee, adding the word "agent" to his signature, and the payee knew that the drawer was authorized by his principal to draw the bill as his agent, and it was the understanding of all parties that the drawer signed only as agent, and not with a view of binding himself; it was held, that the drawer was not personally liable on the bill. And see *infra*, p. 96, note n.

(k) *Maher v. Overton*, 9 La. 115.

(l) *Kean v. Davis*, 1 N. J. 683; *Lazarus v. Shearer*, 2 Ala. 718; *Wetumpka, &c. R. Co. v. Bingham*, 5 Ala. 657; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Owings v. Grubbs*, 6 J. J. Marsh. 31; *Webb v. Burke*, 5 B. Mon. 51; *Brockway v. Allen*, 17 Wend. 40; *Early v. Wilkinson*, 9 Grat. 68. In the note to *Rathbon v. Budlong*, *Fent*

cases, however, which have held this doctrine, are not entirely agreed as to the principle on which it rests, nor do its limits appear to be well defined. Perhaps, as a general rule, it should be received with some distrust.

If an agent make a note in his own name, and add to his signature the word "agent," but there is nothing on the note to

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*v. Stanton, &c.*, 1 Am. Lead. Cas., p. 453 (p. 606 in the 3d ed.), the rule is stated thus: "Where there is a doubt or ambiguity on the face of the instrument, as to whether the person means to bind himself, or only to give an evidence of debt against an institution or body, of which he is a representative, parol evidence is undoubtedly admissible; not, indeed, to show the intention of the parties to the contract, but to prove extrinsic circumstances by which the respective liability of the principal and agent may be determined; such as to which the consideration passed and credit was given, and whether the agent had authority, and whether it was known to the party that he acted as agent. The extent of the principle as to the admissibility of parol evidence appears to be this: Where the names of both principal and agent appear on the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal, so that the instrument, as it stands, is consistent with either view, of its being the engagement of the principal or of the agent, parol evidence is admissible, in a suit against the agent, to charge him, by showing either that credit was given to him, or that he had not authority to bind the principal by that contract, which would create a consideration for a liability on his part, or to discharge him by proving that the consideration passed directly to his principal, as, that credit having been given to the principal alone, the consideration of the note signed by him was an antecedent liability on the part of the principal, and that the other party knew that he acted as agent, and thus destroying all consideration for a liability on his part; and in like manner, to charge or discharge the principal by similar circumstances." *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326. In *Eaton v. Bell*, 5 B & Ald. 34, where commissioners under an enclosure act drew bills upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners; it was *held*, that the commissioners were personally liable to their bankers for the amount of the bills. But it seems that it might have been otherwise, if the direction had been to place the same to the account of the enclosure. *Bayley, J.* said: "The form of the draft is to pay A B. or bearer, on account of the public drainage. The persons, therefore, who signed that order, assert that the money is to be applied to the purpose of the public drainage. The draft then goes on, 'and place the same to our account as commissioners of the enclosure act.' Therefore the money is to be placed to their debit in the account which they have as commissioners. It does not say, 'place the same to the account of the enclosure,' but 'to our account as commissioners.' Now the defendants must have known what they had collected, and what means they had of collecting more; and they ought to have taken care, before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts." In *Fuller v. Hooper*, 3 Gray, 334, it was *held*, that a bill of exchange, stamped in the margin, "Pompton Iron Works," and concluding thus, "Which place to account of Pompton Iron Works, W. Burtt, Agent," purported on its face to be the bill of the Pompton Iron Works, and was binding on the person carrying on the manufacture of iron in that name, if Burtt was his authorized agent. And see *Tripp v. Swanzy Paper Co.*, 13 Pick. 291.

indicate who is the principal, the agent will be personally liable, just as if the word agent were not added.<sup>(m)</sup> It has, however, been held that an indorsement in this form will not render the agent liable as an indorser, because it will be considered as intended only to pass the property in the paper, and therefore as equivalent to an indorsement "without recourse."<sup>(n)</sup>

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<sup>(m)</sup> *Pentz v. Stanton*, 10 Wend. 271; *Savage v. Rix*, 9 N. H. 263; *Thurston v. Mauro*, 1 Greene, 231.

<sup>(n)</sup> *Mott v. Hicks*, 1 Cowen, 513. Accordingly, in *Babcock v. Beman*, 1 Kern. 200, where a note was payable to the order of "R. Beman, Treas.," and he, being the treasurer of a corporation with authority as such to receive and transfer the note, indorsed it, "R. Beman, Treasurer," and delivered it to the plaintiffs, who received it on account of a debt due them from the corporation, with notice of the capacity in which Beman acted; it was *held*, that he was not individually liable as indorser of the note. *Denio, J.* said: "The question is, whether this was a qualified indorsement, passing, as it clearly did, the interest in the note, but without any other contract on the part of the defendant. This question was decided against the plaintiffs, in the Supreme Court, more than thirty years ago, and has since been acquiesced in by the profession, and I have no doubt has been extensively acted on by business men. In *Mott v. Hicks*, 1 Cowen, 513, the only material question was, whether a witness named Houseman was competent to testify, he having been objected to on the ground of interest. He had indorsed a note made by a manufacturing corporation, payable to his order, adding to his name the word agent. His name as payee in the note had no addition annexed to it, but it was proved that the plaintiff was privy to the consideration upon which it was given and indorsed; and that consideration was a debt due from the corporation. If Houseman was personally liable on this indorsement, he was interested, and incompetent as a witness; otherwise he was not. The court *held*, that it was a qualified indorsement, operating as a transfer of the note, but not containing a contract to pay. Chief Justice *Savage* dissented, on the ground that it had not been proved, except by Houseman himself, that he was agent of the company, and that the note was payable to him individually. In these two particulars, the situation of this defendant is more favorable than that of Houseman. It has been *held*, that an indorsement of a note to the cashier of a moneyed corporation, by adding the word cashier to his name in the indorsement, is a transfer to the corporation, where that was the design of the transaction. (*Watervliet Bank v. White*, 1 Denio, 608.) So this note, before the indorsement, may be considered as having been the property of the manufacturing corporation, it being substantially averred that such was the nature and intent of the transaction upon which it was given. The case of *Mott v. Hicks* is therefore a direct adjudication upon this very point, by the highest court of original jurisdiction in this State; and it has been acquiesced in and regarded as the law for a great length of time. The question was in the highest degree practical, and of more frequent occurrence than almost any other. It moreover related to commercial paper, in respect to which it is of the utmost importance that the decisions of the courts should be stable, so that they may be relied on with confidence by the community. We should be, therefore, most reluctant to depart from the principle of the case, even could it be successfully questioned as not in harmony with legal analogies or antecedent cases. We think, however, it is not subject to any such criticism. It has been followed in principle in *Brockway v. Allen*, 17 Wend. 40, and in *Hicks v. Hinde*, 9 Barb. 528

If an agent of an incorporated company make a note, beginning, "I promise," &c., and sign it, "A. B., agent of — company," it is quite well settled, that the company, not the agent, will be liable on the note. (o) And the same rule applies, *a for-*

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and has not been questioned, so far as we know, by any case." And see *Collins v. Johnson*, 16 Ga. 458. See also, *supra*, p. 94, note j.

(o) *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 205; *McCall v. Clayton*, Busbee, 422; *Proctor v. Webber*, 1 D. Chip 371; *Roberts v. Button*, 14 Vt. 195; *Shelton v. Darling*, 2 Conn. 435; *Johnson v. Smith*, 21 Conn. 627. In *Hovey v. Magill*, 2 Conn. 680, where the defendant, being the agent of a corporation, gave a note in the form stated in the text, *Swift*, C. J. said: "When an agent duly authorized subscribes an engagement, in such manner as to manifest an intent not to bind himself, but to bind the principal; and when, by his subscription, he has actually bound the principal, then it is clear that the contract cannot be binding on him personally. It will be agreed that no precise form of words is required to be used in the signature; that every word must have an effect, if possible; and that the intention must be collected from the whole instrument taken together. Who can entertain a doubt, upon reading the note in question, that it was the intent of the defendant to bind the company, and not himself? It is, however, said, that he has made use of the expression 'I promise,' which is, in terms, a personal undertaking; but he has qualified it by adding his character of agent, which unequivocally shows that he did not mean to bind himself. Again, it is said, he might have added this merely to distinguish the company from his private concerns. This is a far-fetched supposition indeed. If such had been the object, it could much more effectually have been answered by a proper mode of keeping his accounts. I can see no good reason for the addition of 'agent,' but to render the note obligatory on the company, and exclude all idea of individual liability. This is the plain language of the transaction; and we ought to give it the obvious meaning, and not entrap men by the mere form of words. This mode of signing the note will fairly admit of this construction: I, as agent of the company, pledge their credit, or give their promise, to pay the note; or, the company by me as their agent, promise to pay it. But if we consider the word agent as merely *descriptio personæ*, we give it no operation, and really expunge it from the writing. We are bound, however, to give effect to every word, if possible; and the only way to give this word any effect is, to make the note binding on the company." But see *Macbean v. Morrison*, 1 A. K. Marsh. 545; *Kean v. Davis*, 1 N. J. 683, 1 Spencer, 425; *Wyman v. Gray*, 7 Harris & J. 409; *Hills v. Bannister*, 8 Cowen, 31; *Brockway v. Allen*, 17 Wend. 40, *Rathbon v. Budlong*, 15 Johns. 1; *Barker v. Mechanic Ins. Co.*, 3 Wend. 94. In *Mare v. Charles*, 5 Ellis & B. 978, an order to pay to the drawer's order at three months after date a sum of money "for value received in machinery supplied the adventurers in H. mines," was directed "to Mr. W. C." W. C. wrote upon it, "Accepted for the company, W. C., Purser." *Held*, that this made W. C. personally liable as acceptor of the bill. But this decision proceeded upon the ground, that, the bill having been directed to W. C. alone, the company could not be bound by his acceptance. Lord *Campbell* said: "The bill is drawn on the defendant as an individual; it is addressed 'to Mr. W. Charles.' It is true, it is stated to be drawn for value supplied to the adventurers in a mining company; but it is drawn on Charles as an individual. He writes upon it, 'Accepted for the company'; and he signs this 'William Charles, Purser.' If the words of an instrument will reasonably bear an interpretation making it valid, we must not construe them so as to make it void. *Benignæ faciendæ sunt interpretationes, ut res magis valeat*

*tiori*, to the case of public officers or agents appointed to discharge public trusts and duties.<sup>(p)</sup> Whether a note made in the same form, by the duly authorized agent of a private person, would be the note of the principal, or of the agent, is not so cer-

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*quam pereat; et verba intentioni, non e contra, debent inservire.* If a bill be drawn on me, I must accept it so as to make myself personally liable, or not at all; for no one but the drawee can accept. I think, therefore, that when a drawee accepts a bill, unless there be on the face of the bill a distinct disclaimer of personal liability, he must be taken to accept personally. In the present case, the acceptance is not *per proc.* the company. If it were, perhaps that might have some weight as amounting to such an absolute disclaimer of personal liability. It appears on the face of the bill that it is drawn on account of a debt of the company; it is very likely that the drawee accepted on account of the company, and on an engagement from them that they would keep him in funds to meet the bills. In that case he may well be said to accept for the company; but then it is an acceptance making himself personally liable." *Coleridge, J.*: "The bill was addressed to the defendant, and no one else could accept it. He wrote upon it, 'Accepted,' and signed his name. He now says, in effect, that it was not accepted at all, and that what he wrote amounted to a refusal to accept; and this he says is the effect of the words 'for the company.' The question then is, Are we to construe this *ut res magis pereat*, as not an acceptance? No; we must construe it, *ut res magis valeat*; and, as my lord has pointed out, it is easy so to construe it." *Wightman, J.*: "The bill is drawn on the defendant for value received by a company. The defendant accepts it, adding to the word accepted, 'for the company.' He may have accepted it on their account, and relying on their liability to him; but, whatever was his motive, he accepted it, and cannot now ask us to construe the acceptance so as to be inoperative. Unless he accepted the bill, drawn upon himself personally, in the sense that he rendered himself personally liable, he did not accept it at all; on any other construction, what he wrote on the bill must have amounted to a refusal to accept it. But it is clear that he did intend that the bill should not be dishonored, but accepted; and we must construe what he has written, *ut res magis valeat*." See *Shelton v. Darling*, 2 Conn. 435. And see *Nicholls v. Diamond*, 9 Exch. 154. So in *Rew v. Pettet*, 1 A. & E. 196, where a parish vestry resolved to borrow money from H. N., who advanced it, and took promissory notes for the amount, made by the defendants, who were churchwardens and overseers, and who added to their signatures the titles of their respective offices; it was *held*, that the defendants were personally liable. But this also was upon the ground that the parish could not be bound; and that, unless the defendants were held personally, the note must be treated as waste paper. See further, *Chick v. Trevett*, 20 Maine, 462; *Fogg v. Virgin*, 19 Maine, 352; *Pomeroy v. Slade*, 16 Vt. 220. In *Bradlee v. Boston Glass Co.*, 16 Pick. 347, a note was given in this form: "For value received, we, the subscribers, jointly and severally, promise, &c., for the Boston Glass Manufactory." It was signed by H., G., and K., without annexing to their names any words designating a connection with the corporation; but it was entered in the note-book of the corporation as a note due from the corporation, and the interest thereon was annually paid by them. It was *held*, that it was the note of the individuals by whom it was signed, and that it did not bind the corporation. *Shaw, C. J.* said: "As the forms of words in which contracts may be made and executed are almost in-

(p) *Jones v. LeTombe*, 3 Dallas, 384; *Tutt v. Hobbs*, 17 Misso. 486; *Fox v. Drake*, 8 Cowen, 191.

tain. We think, however, it would be the note of the principal.(q) If such an agent give a note, beginning, "I promise," &c., and signed "A, for B," it has been decided, in several cases, that this is the note of the principal, and not of the agent.(r)

initely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal are intended to indicate that he does a mere ministerial act, in giving effect and authenticity to the act, promise, and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party? . . . . The words 'for the Boston Glass Manufactory,' if they stood alone, would perhaps leave it doubtful and ambiguous, whether they meant to bind themselves as promisors to pay the debt of the company, or whether they meant to sign a contract for the company, by which they should be bound to pay their own debt; though the place in which the words are introduced would rather seem to warrant the former construction. But other considerations arise from other views of the whole tenor of the note. The fact is of importance, that it is signed by three instead of one, and with no designation or name of office indicating any agency or connection with the company. No indication appears on the note itself, that either of them was president, treasurer, or director, or that they were a committee to act for the company. But the words 'jointly and severally' are quite decisive. The persons are 'we, the subscribers,' and it is signed Jonathan Hunnewell, Samuel Gore, and Charles F. Kupfer. This word 'severally' must have its effect; and its legal effect was to bind each of the signers. This fixes the undertaking as a personal one. It would be a forced and wholly untenable construction to hold that the company and signers were all bound; this would be equally inconsistent with the terms and the obvious meaning of the contract." See *Trask v. Roberts*, 1 B. Mon. 201; *Emerson v. Providence Hat Manuf. Co.*, 12 Mass. 237; *Mann v. Chandler*, 9 Mass. 335; *Packard v. Nye*, 2 Met. 47; *Shotwell v. M'Kown*, 2 South. 828.

(q) It was so decided in *Ballou v. Talbot*, 16 Mass. 461.

(r) *Long v. Colburn*, 11 Mass. 97; *Frost v. Wood*, 2 Conn. 23; *Robertson v. Pope*, 1 Rich. 501 (overruling *Fash v. Ross*, 2 Hill, S. Car. 294; *Taylor v. McLean*, 1 McMullan. 352; *Moore v. Cooper*, 1 Speers, 87). But see, *contra*, *Offutt v. Ayres*, 7 T. B. Mon. 356; *Musgrove v. McIlroy*, 5 J. J. Marsh. 646; *Garrison v. Combs*, 7 J. J. Marsh. 84. In *Cook v. Sanford*, 3 Dana, 237, the note began, "We promise," &c., and was signed, "A, for B & Co." *Held*, that A was not personally liable. In *Early v. Wilkinson*, 9 Grat. 68, the note began, "I promise," &c., and was signed, "Robert H. Early [for Samuel H. Early]." *Held*, that the note upon its face was binding upon Robert H. Early personally. Otherwise, if the name of Samuel H. Early had not been enclosed in brackets. In *Rice v. Gove*, 22 Pick. 158, an action was brought against the defendant on a note beginning, "For value received, we jointly and severally promise to pay," &c., and signed, "Patton & Johnson, for Ira Gove." The plaintiff having proved that P. & J. were authorized to give notes as the agents of the defendant, the court *held*, that this must be construed as the note of the defendant. *Dewey, J.* said: "The only doubt in the present case arises from the introduction of the words 'jointly and severally' in the notes. These words, it is said, indicate a personal promise by Patton & Johnson, and can have no proper application to a promise by the defendant alone. If there were not other words in the contract indicating more strongly the purpose to bind the defendant than these do the contrary design, perhaps



There is no especial mode, recognized by law, of giving authority to make or accept or indorse negotiable paper. It may be given by parol. It may be inferred from the course of business and employment; and from the fact that similar transactions have been repeatedly recognized by the principal as done by his authority. Such presumptions frequently arise in reference to the acts of a wife, a servant, a son, or a clerk. A jury would not be warranted in drawing this conclusion from one or two instances of such recognition; but only from such and so many as would make the belief of such authority strong and reasonable.(s)

The question of authority, or of evidence of authority, so far as it relates to the obligation of the principal, must always be determined by the principles which lie at the foundation of the law of agency; namely, that a person is bound by the acts of another

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the words 'jointly and severally' should control the construction to be given to these notes. But we think that it may be fairly urged, that the form of the signature of these notes so clearly manifests the purpose to be the execution of a contract binding solely upon the defendant, that, if either is to be rejected as surplusage and of no effect, it should be the words 'jointly and severally.' The case of *Bradlee v. Boston Glass Company*, 16 Pick. 347, is supposed, by the counsel for the defendant, to bear strongly upon the question. It does so upon the effect to be given to the words 'jointly and severally,' as used in the body of these notes; but upon a particular examination of the facts of that case, it will be seen that the signatures to that contract were by the individual names of those who were alleged to have acted as agents, and were accompanied with no designation of any agency annexed to their names, the only reference to any such agency being found, if anywhere, in the body of the notes."

(s) In *Prescott v. Flinn*, 9 Bing. 19, where it appeared that the defendants' confidential clerk had been accustomed to draw checks for them; that in one instance, at least, they had authorized him to indorse; and in two other instances had received money obtained by his indorsements in their name; it was *held*, that a jury was warranted in inferring that the clerk had a general authority to indorse. And see *Trundy v. Farrar*, 32 Maine, 225. In *Valentine v. Packer*, 5 Penn. State, 333, in an action on a note of a firm, conducting iron-works, signed by one T., it was shown that T. was the son of one member of the firm and nephew of two others; that he was their bookkeeper and manager at the time the note was given; that it was not customary for clerks to give notes, though one witness knew of its being done by T. *Held*, that this evidence was sufficient to entitle the plaintiff to read the note to the jury. In *Paige v. Stone*, 10 Met. 160, in a suit against two principals on a negotiable note, of which they had no knowledge before action brought, given in their names by their agent, who had no express authority, nor any authority by necessary implication from the nature of his business, to give such note; it was *held*, that evidence of the agent's having given two similar notes, to the first of which one only of the principals afterwards assented, and the last of which, for a small sum, the principals directed to be settled after they were sued upon it, was not sufficient to prove the authority of the agent to bind them by the third note. See *Odiorne v. Maxcy*, 13 Mass. 178. 15 Mass. 39.

as his agent, if, in the first place, he has actually authorized the act, or if, in the second place, he has authorized those with whom the agent dealt on his behalf to believe, as fair and reasonable men, that the authority had been actually given." On this last ground, where an acceptor's defence was, that the drawer had forged the acceptor's signature, evidence that the defendant had previously paid such acceptances was held to be proof of his authority to the drawer to accept for him.(t)

A ratification of an act has, in general, the same effect as a previous authority; (u) and this ratification may be by parol only. And it is an almost universal rule, that the ratification must be made with a full knowledge on the part of the principal of the facts affecting his rights.(v) And if a person does an act purporting to act as agent for another, a third person cannot afterwards adopt that act, and make the person who did it his agent.(w) Nor will any ratification, however effectual to bind the principal, discharge the liability of the agent, if he had not authority to represent the principal when he did so.(x) It is,

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(t) *Barber v. Gingell*, 3 Esp. 60. In *Cash v. Taylor*, Lloyd & W. Merc. Cas. 178, in an action against the acceptor of a bill of exchange, it appeared that the acceptance was not in the handwriting of the defendant himself, but in that of a brother-in-law of his, named Alfred Tallent; that other bills, accepted by Tallent in the defendant's name, had been paid by him; and that a letter had been written by the defendant's authority, before the date of the bill sued upon, to the holder of another similar bill, who was pressing the defendant for payment; in which letter it was stated that the defendant had long been in the habit of indorsing bills for Tallent, and that he had given that person authority to act generally for him in his dealings with London houses; and that he, the defendant, would therefore of course take up the bill which was the subject of the letter, if the holder enforced payment of it. But it also appeared that the plaintiff had not had any communication with, or knowledge of, the defendant, and was not aware that any other bills had been accepted for him by A. Tallent. It was held, that the defendant was not liable. The court said: "The plaintiff knew nothing of the letter given in evidence, or of the acceptance of similar bills for the defendant by Tallent; he did not, therefore, take the bill in question on the faith of Tallent's authority to accept. That being so, he was bound to make out that Tallent had either a general authority to accept, subsisting unrevoked at the time of this acceptance, or a particular authority to accept the bill in question. It is not contended that there was any proof of the latter; and the letter furnished no proof of a general authority: it cannot be carried beyond the particular bill to which it referred." See *Jewellyn v. Winckworth*, 13 M. & W. 598.

(u) *Bigelow v. Denison*, 23 Vt. 564.

(v) *Nixon v. Palmer*, 4 Seld. 398; *Fletcher v. Dysart*, 9 B. Mon. 413.

(w) See *Wilson v. Tumman*, 6 Man. & G. 236.

(x) *Rossiter v. Rossiter*, 8 Wend. 494.



however, generally true; that if the principal is bound, the agent is not.<sup>(y)</sup>

It is a general rule, in regard to simple contracts, that parol evidence may be received to make unnamed principals liable, or to give them the benefit of the contract; for this leaves the actual party liable as before, and therefore cannot be considered as varying the contract. But such evidence cannot be received to discharge the actual signer on the ground of his agency, for this would be to vary the contract.<sup>(z)</sup> In reference to negotiable paper, however, the rule, as we have seen, is more strict. For parol evidence is not admissible, either to discharge an actual signer, or to charge one whose name does not appear on the instrument.<sup>(a)</sup> The reason for this is, that, from the nature and purpose of negotiable paper, no person should be held as a party to it whose name is not written upon it, as such paper ought to contain in itself all its own evidence, and thus be independent of extrinsic proof.

One who puts his name on negotiable paper will be liable personally, as we have seen, although he acts as agent, unless he says so, and says also who his principal is; that is, unless he uses some expression equivalent, to use Lord *Ellenborough's* language, to "I am the mere scribe." For if the construction may fairly be, that while he acts officially, or at the request of others, or for the benefit of others, yet what he does is still his own act, it will be so interpreted. Thus, if a bill direct the proceeds to be placed "to the account of the Durham Bank, as advised,"<sup>(b)</sup> or where the drawee is called "cashier"

<sup>(y)</sup> *Mann v. Chandler*, 9 Mass. 335; *Shelton v. Darling*, 2 Conn. 435.

<sup>(z)</sup> See 1 Parsons on Cont. 48, note a.

<sup>(a)</sup> See *supra*, p. 93, note h; per *Metcalf, J.*, in *Faller v. Hooper*, 3 Gray, 334.

<sup>(b)</sup> In *Leadbitter v. Farrow*, 5 M. & S. 345, an agent of the Durham Bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon London, drew a bill in his own name for the amount, and sent it to the plaintiff; it was *held*, that the agent was liable as drawer, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him as such and on account of the Durham Bank, to which the agent paid over the money. Lord *Ellenborough* said: "Is it not a universal rule, that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the Durham Bank, he might not know but that he meant to offer his own responsibility."

of a certain company, and direction is given that the money be placed to the account of that company, and the bill is accepted by the drawee by direction of the company, the drawee is still personally held.(c) Nor does it generally seem to make any difference that the agency was actually known to the parties who hold the agent liable.

The peculiar character of negotiable paper has induced courts to enforce the liability of an agent somewhat strictly; as if a broker, who sells goods for an owner, draws on the buyer in favor of the owner, if this bill be dishonored, it has been held that the owner may sue the broker on it, as drawer;(d) and generally, it seems, an agent who draws in favor of his principal, and directs the money to be put to the debit of his principal, will nevertheless be held personally liable to his principal, unless he protects himself by appropriate and definite language.(e)

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Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not so done, and therefore has made himself liable. I do not say whether an action would lie against the Durham Bank, because, considering it in either way, it would not, as it seems to me, affect the liability of the defendant." *Holroyd, J.* said: "I apprehend that no action would lie on the bill, except against those who are the parties to it." In *Sowerby v. Butcher*, 2 Crompt. & M. 368, a broker at N. shipped a cargo of coals, and drew a bill of exchange on the consignees in favor of the vendors. The bill being returned by the drawees in consequence of the shortness of the date, the vendors, by the direction of the broker, drew another bill at a longer date. It was taken to the broker's counting-house for signature, but the broker having left N. in consequence of embarrassments, the defendant, his brother, who had come there to investigate his affairs, at the request of the vendors and for their convenience, signed the second bill generally. *Held*, that he was personally liable on the bill. It was objected for the defendant, that he did not profess to act, nor could be treated, as an agent; and that the bill, as to him, was without consideration. We think there was much force in the objection. See further, *Beckham v. Drake*, 9 M & W 79; *Beckham v. Knight*, 1 Man. & G. 738.

(c) *Thomas v. Bishop*, 2 Stra. 955.

(d) *Le Fevre v. Lloyd*, 5 Taunt. 749. In this case the court said: "The broker by giving this bill put an end to all doubt as to the buyer's responsibility. The vendors, upon receiving it, in consequence of their good opinion of *Lloyd*, dismiss from their minds all care about the solvency of the purchaser."

(e) In *Goupy v. Harden*, 7 Taunt. 159, it was held that an agent purchasing foreign bills for his principal, and indorsing them to him, without qualification, is liable to his principal on his indorsement, however small be the commission which he gets upon the purchase. And *Dallas, J.* said: "The defendants might have specially

It should be remarked, however, that the soundness of these decisions has been questioned, and it would seem with some reason. Mr. Chitty says: "These decisions, subjecting an agent to personal liability, as regards *third* persons, ignorant of the circumstances under which the agent became a party, are consistent with the other principles of law applicable to these instruments. But it seems questionable whether even at law it is correct to allow an employer to recover from his agent under such circumstances, because in general, between original parties, it may be shown as a good defence at law, that the bill was drawn, accepted, or indorsed for the plaintiff's accommodation, or for a purpose or consideration which has failed or been satisfied; and to allow such a principal to recover at law against his agent, is only to compel the latter to resort to a court of equity for relief, which might just as well be afforded at law, and a court of equity will certainly afford relief."(*f*) This reasoning has been adopted in Pennsylvania, and the authority of the English decisions to the contrary entirely repudiated. It is there held that a factor who remits a bill to his principal in payment of goods sold on his account, and indorses the bill, does not thereby become personally responsible to his principal, if he receives no consideration for guaranteeing, and does not expressly undertake to do so.(*g*)

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indorsed this bill *sans recours*, if they had thought fit so to do, but they have not done it." And see *Simpson v. Swan*, 3 Camp. 291; *Heubach v. Mollmann*, 2 Duer, 227.

(*f*) Chitty on Bills, 9th ed., p. 34. The learned author cites in support of this proposition, *Kidson v. Dilworth*, 5 Price, 564, and *Ex parte Robinson*, 1 Buck, 113. In the former case, a solicitor, who was employed by an administrator in getting in debts due to the estate of the intestate, having received money in the course of his agency, which it was his duty, according to his instructions, to remit to his employer, procured for that purpose a banker's bill, which was accidentally drawn in his favor, so that it became necessary that he should indorse it, and he did so. *Held*, that a court of equity would restrain an action commenced against him on such indorsement, whether brought by the immediate indorsee, or by any other person who had notice of the facts. In *Ex parte Robinson*, it was held, that when a person employed to get a bill discounted, being unable to effect it without indorsing it, therefore indorsed it in his own name, he was entitled to be indemnified by his employer, though the name of the latter was not on the bill.

(*g*) *Mechanics' Bank v. Earp*, 4 Rawle, 384, 389; *Sharp v. Emmet*, 5 Whart 288. In the last case, *Sergeant, J.* said: "Formerly there seems to have been in the law merchant a severe and inflexible rule applied, that whenever an agent or factor indorsed a bill, he was liable on his indorsement, unless he took care at the time to limit his responsibility, by stating that it was '*sans recours*,' or by procuration, or some similar

In a case in the House of Lords, on appeal from Scotland, where a factor, under a *del credere* commission, sold goods and took accepted bills from the purchasers, which he exchanged for a bill on London, payable to his own order; and this last he indorsed and transmitted to his principal; it was held that the factor was answerable for the amount of the bill, "being personally liable, under his commission *del credere*, to satisfy his principal the price of the goods sold."<sup>(h)</sup>

An agent is personally liable on the contract he makes, if he makes himself so expressly, or if he transcends his authority, or if he departs from its terms and directions, or if he conceals his character of agent, or if he purposely conceals the name of his principal, or, perhaps, if he does not actually state the name of his principal; and these general principles would no doubt apply to the acts of an agent in relation to negotiable paper. It is expressly held, that the rule which denies to an agent generally the power of delegating his authority to another applies to promissory notes.<sup>(i)</sup> But this rule must be understood with proper limitations. An agent cannot delegate any portion of his power requiring the exercise of discretion and judgment; but it is otherwise as to powers or duties merely mechanical in their nature. Therefore, if an agent be empowered to bind his principal by an accommodation acceptance, he may direct another to write it, having first determined the propriety of the act himself; and it will

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mode. The authorities cited by Mr. Justice Rogers, in *Mechanics' Bank v. Earp*, and those referred to in the argument here, sufficiently show this. But it is equally certain, that in more modern times the severity of this rule has been relaxed; and it is now held, that between the agent and the principal, the agent remitting a bill for payment with his indorsement is not obliged, in order to exempt himself, to do so in express terms on the face of the indorsement. Such a restriction is objectionable in many instances, as calculated to throw a doubt over the responsibility of the prior parties, and to discredit them with those who may see the indorsement. The rule is, that the indorsement of the factor must be construed by the circumstances under which it is made; and unless there be something to show that in indorsing he intended to render himself personally liable, or that he was bound to do so, it ought not to be so intended. A factor remitting a bill to his principal in payment of goods sold on his account, and receiving no consideration for guaranteeing the bill, nor undertaking to do so, is not personally responsible merely on his indorsement."

<sup>(h)</sup> *Mackenzie v. Scott*, 6 Bro. P. C. 280. But see as to this case, *Sharp v. Emmet*, *supra*; *Leverick v. Meigs*, 1 Cowen, 645.

<sup>(i)</sup> *Emerson v. Providence Hat Manufacturing Co.*, 12 Mass. 237; *Brewster v. Hoart*, 15 Pick. 302.

bind the principal, it seems, although it names the delegate, and not the agent, as the one exercising the power.(j) Nor does the rule, it seems, apply to a partner.(k)

A general authority to transact business, even if it be expressed in words of very wide meaning, will not be held to include the power of making the principal a party to negotiable paper. Therefore, a power given to a copartner, upon the dissolution of the firm, to receive all debts owing to, and pay those owing from, the late partnership, does not, it has been held, authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution.(l) And a power of attorney given by an executrix, to act for her generally as executrix, does not authorize the accepting of bills of exchange in her behalf, though for debts due from her testator.(m) So if full authority be given to an attorney to ask, demand, and receive all money that may become due to the principal on any account whatsoever, and to "transact all business," this will not authorize the attorney to indorse bills received in payment.(n) So a power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, and dues whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal.(o)

Where a power of attorney gave the agent full powers as to the management of certain specified real property, with general

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(j) *Commercial Bank v. Norton*, 1 Hill, 501. And see *ante*, p. 84, note r.

(k) *Tillicr v. Whitehead*, 1 Dallas, 269. In this case it was resolved, "that one of two partners may give an authority to a clerk under the firm of the house; and that the clerk may, in consequence thereof, accept bills, and sign or indorse notes, in the name of the company. And it was said by *M'Kean*, C. J., that this case could not be properly compared with the case of an attorney without power of substitution; for the attorney cannot exceed the letter of his authority, being nothing more than an agent himself. But each partner is a principal; and it is implied in the very nature of their connection, that each has a right to depute and appoint a clerk to act for both, in matters relative to their joint interest."

(l) *Kilgour v. Finlyson*, 1 H. Bl. 155. See *post*, pp. 144-147.

(m) *Gardner v. Baillie*, 6 T. R. 591, overruling *Howard v. Baillie*, 2 H. Bl. 618, so far as the two cases are inconsistent.

(n) *Hogg v. Snaith*, 1 Taunt. 347; *Hay v. Goldsmid*, 2 J. P. Smith, 79, cited also in *Hogg v. Snaith*, 1 Taunt. 347.

(o) *Murray v. East India Co.*, 5 B. & Ald. 204.

words extending those powers to all the property of the principal of every description, and, in conclusion, authorized the agent to do all lawful acts concerning all the principal's business and affairs, of what nature or kind soever, it was held that this did not authorize the agent to indorse bills of exchange in the name of the principal.<sup>(p)</sup> But where A, the proprietor of a cotton factory, gave a letter of attorney to B, conferring on him the agency of the factory for five years, empowering him to purchase any articles for the use of the factory, and engaging to become responsible for all contracts entered into by him in the capacity of agent, for machinery and cotton for the use of the factory ; it was held, that A was liable on a promissory note given by B, as the agent of A, and in his name, for money borrowed by the former, within the term, and to effect the object, of his agency. It may be found difficult to reconcile this decision with the current of authorities upon the subject, and we have some doubts whether it can be supported.<sup>(q)</sup>

So carefully is this authority watched, that, where power is given to do some things with regard to promissory notes or bills, it cannot be enlarged by construction to do other, though somewhat similar, things. Thus, the authority to draw is not, of itself, an authority to indorse bills ; <sup>(r)</sup> nor would it be to accept them.<sup>(s)</sup> And an authority to draw, indorse, or accept for a party, does not permit the agent to bind his principal together with others as copartners ; <sup>(t)</sup> nor to put his name to mere accommodation paper for other parties.<sup>(u)</sup> The presump-

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<sup>(p)</sup> *Esdaile v. La Nauze*, 1 *Younge & C.*, Exch. 394.

<sup>(q)</sup> *Frost v. Wood*, 2 *Conn.* 23.

<sup>(r)</sup> *Robinson v. Yarrow*, 7 *Taunt.* 455 ; *Murray v. East India Co.*, 5 *B. & Ald.* 204 ; *Prescott v. Flinn*, 9 *Bing.* 19. ,

<sup>(s)</sup> *Attwood v. Munnings*, 7 *B. & C.* 278, 1 *Man. & R.* 66.

<sup>(t)</sup> *Attwood v. Munnings*, 7 *B. & C.* 278, 1 *Man. & R.* 66. And see *Stainback v. Read*, 11 *Grat.* 281.

<sup>(u)</sup> *Wallace v. Branch Bank*, 1 *Ala.* 565. In this case it was held that an attorney, "with full power and authority, for me, and in my name, to draw or to indorse promissory notes, to accept, draw, or indorse bills of exchange," has no authority to draw or indorse notes for the mere accommodation of third persons. So a power of attorney, "in my name and behalf to sign and indorse notes payable and negotiable at the branch bank," &c. "as well for discount as collection, and to check all money which may be deposited therein to my credit, from time to time, until this authority is revoked," was held not to authorize an original indorsement as security for a third person. *Nichols v. State Bank*, 3 *Yerg.* 107 ; *Nichol v. Green*, *Peck*, 283. But where



tion of the law limits such authority to the acting in the principal's own business, and for his own benefit.(v) But if an agent be authorized *generally* to execute notes in the name and for the benefit of his principal, and he executes notes in his principal's name for the fraudulent purpose of raising money for his own use, such notes will, nevertheless, be binding upon the principal, in the hands of a *bona fide* holder.(w)

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a witness testified that he was the general agent of a firm, intrusted with the sole charge of their business, and that as such he had been in the habit of drawing drafts and making notes and indorsements for them, this was held sufficient to go to the jury as a ground for inferring that he had authority to bind his principals by an accommodation acceptance, though the power conferred on him by the articles of copartnership did not extend so far, and he had never attempted to bind the firm in that way. *Commercial Bank v. Norton*, 1 Hill, 501.

(v) *North River Bank v. Aymar*, 3 Hill, 262; *Stainback v. Read*, 11 Grat. 281; *Stainer v. Tysen*, 3 Hill, 279; *Stainback v. Bank of Virginia*, 11 Grat. 269. But see *Bank of Bengal v. Macleod*, 7 Moore, P. C. 35; *Bank of Bengal v. Fagan*, 7 Moore, P. C. 61.

(w) *North River Bank v. Aymar*, 3 Hill, 262. In this case, P. gave J. a letter of attorney authorizing the latter, among other things, to draw and indorse notes in the name and for the benefit of the former; and the letter was deposited with a bank, through which it was expected some of the business would be done. Various notes and indorsements were subsequently made by J.; all of which purported on their face to have been executed for P. in conformity with, and in pursuance of, the letter of attorney. In truth, however, the notes had no connection with P.'s business, but were given for the accommodation of third persons, who indorsed them to the bank in which the letter of attorney had been deposited; the latter receiving them in the regular course of business, without notice, and for a valuable consideration. *Held*, that P. was liable to the bank on the notes; though as between him and J. they were unauthorized and fraudulent. *Nelson*, C. J. dissented. The judgment in this case is said to have been afterwards reversed in the Court of Errors. But we think the decision of the Supreme Court was correct. See the observations of *Comstock, J.*, in *Mechanics' Bank v. New York & New Haven Railroad Company*, 3 Kern. 632, *et seq.* In *Bank of Bengal v. Macleod*, 7 Moore, P. C. 35, and *Bank of Bengal v. Fagan*, 7 Moore, P. C. 61, the payee of promissory notes of the East India Company, by a power of attorney, authorized his agents at *Calcutta* to "sell, indorse, and assign" the notes. The agents, in their character of private bankers, borrowed money of the Bank of Bengal, offering, as security, these promissory notes. The bank made the advance, and the agents indorsed the notes, in the name of their principal, and deposited them with the bank, by way of collateral security for their personal liability; at the same time authorizing the bank, in default of payment, to sell the notes in reimbursement of the advances. *Held*, that the indorsement of the notes by the agents of the payee to the bank was within the scope of the authority given to them by the power of attorney. Lord *Brougham* said: "It is said that the indorsement was only to be made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the indorsee's title must depend upon the authority of the

But the principal would not be held, if the holder had notice or knowledge of the fraud.(x)

If one signs his name to a bill or note, leaving a blank for the sum, and intrusts it to another, this is *prima facie* evidence of authority; in England, to insert any sum that the stamp will cover, and for any purpose; and in this country, to insert an indefinite sum.(y) As between the immediate parties, and all others who have notice of any limitation in the authority, this presumption may be rebutted; (z) but as to *bona fide* purchasers without notice, it is conclusive. And it is immaterial that the holder knew that the note was signed in blank, if he had no notice that the authority to fill the blank was limited.(a) Such a blank signature is a letter of credit for an indefinite sum; it is

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indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." In the case of *Exchange Bank v. Monteath*, 17 Barb. 171, where an agent, who derived a general authority to bind his principal by bills and notes from the nature and course of his employment, and not from a written power, drew a bill in the name of his principal for the accommodation of a third person, it was held, that the principal was liable upon the bill, in an action brought by a *bona fide* holder. And see *Mann v. King*, 6 Munf. 428; *Stainback v. Bank of Virginia*, 11 Grat. 269; *Stainback v. Read*, 11 Grat. 281; *Newland v. Oakley*, 6 Yerg. 489.

(x) *Stainer v. Tysen*, 3 Hill, 279. In this case, D. executed a letter of attorney authorizing G. to draw and indorse notes for and in the name of the former. Afterwards G., being a member of a firm largely indebted to the plaintiff and utterly insolvent, but with which D. had no connection, applied to the plaintiff for a compromise, and terms were agreed on; whereupon G. made a note in D.'s name, payable to the firm, and delivered it to the plaintiff by way of perfecting the compromise. Held, in an action against D., that the plaintiff could not be deemed to have received the note *bona fide*; and as G. had given it without authority, the action could not be maintained. So in *Stainback v. Bank of Virginia*, 11 Grat. 269, a power of attorney was given to an agent, to draw, indorse, or accept bills, and to make and indorse notes, negotiable at a particular bank, in the name of the principal. Held, that a party dealing with the agent, with knowledge or means of knowledge that under such power he was indorsing the name of his principal for his own benefit, was not entitled to recover from the principal; and that the fact that the attorney was the drawer of the bill upon which he indorsed the name of his principal, held the bill at the time it was discounted by the holder, and that the proceeds were passed to his credit, were of themselves full proof that the attorney was acting for his own benefit, and not that of his principal. And see *Stainback v. Read*, 11 Grat. 281.

(y) *Russel v. Langstaffe*, 2 Dougl. 514; *Collis v. Emett*, 1 H. Bl. 313; *Violet v. Patton*, 5 Cranch, 142.

(z) *Hatch v. Searles*, 2 Smale & G. 147; *Johnson v. Blasdale*, 1 Smedes & M. 17; *Hemphill v. Bank of Alabama*, 6 Smedes & M. 44; *Goad v. Hart*, 3 Smedes & M. 787; *Hall v. Commonwealth Bank*, 5 Dana, 258.

(a) *Huntington v. Branch Bank*, 3 Ala. 186; *Russel v. Langstaffe*, *supra*. But see *Hatch v. Searles*, *supra*.



saying to the public, "Trust A. B. to any amount, and I will be his security." (b) Therefore it would be no defence against a *bona fide* holder to prove, either that the person to whom the instrument was intrusted had no authority at all to fill the blank ; or that his authority was limited to a certain sum, which he had exceeded ; (c) or that he was only authorized to use the paper for a particular purpose, and had fraudulently converted it to a different purpose ; (d) or that he was only authorized to fill

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(b) Per Lord *Mansfield*, in *Russel v. Langstaffe*, *supra*.

(c) Thus, in *Fullerton v. Sturges*, 4 Ohio State, 529, P. and others, sureties of C., signed an instrument payable to S or order, in blank as to the date, amount, and time of payment, but with a private agreement that it should not be filled for more than \$1,000 or \$1,500, and delivered it to C., the principal, to procure the discount. Subsequently, the instrument was presented by C. to S., the payee, and filled up and discounted for the sum of \$10,000. *Held*, that one who intrusts his name in blank to another to procure a discount is liable to the full extent to which such other may see fit to bind him, when the paper is taken in good faith, without notice, actual or constructive, that the authority given has been exceeded ; that such signature in blank has the effect of a general letter of credit ; and the rule is founded as well on that general principle, which casts the loss, when one of two innocent persons must suffer, upon him who has put it in the power of another to do the injury ; as also upon the rule, in the law of agency, which makes the principal liable for the acts of his agent, in violation of his private instructions, when he has held the agent out as possessing more enlarged authority. And see, to the same effect, *Roberts v. Adams*, 8 Port. Ala. 297 ; *Herbert v. Huie*, 1 Ala. 18 ; *Decatur Bank v. Spence*, 9 Ala. 800. But see *infra*, p. 113, notes *g* and *h*.

(d) *Putnam v. Sullivan*, 4 Mass. 45, is an important and leading case upon this point. That was an action by indorsees against indorsers of a promissory note. It appeared that, one of the defendants being abroad in Europe, the other, having occasion to make a journey from Boston to Philadelphia, intrusted to a clerk of the house several papers, indorsed by the firm in blank, to be used by the clerk when money was to be advanced on the sale of goods by the house on commission, or to renew the notes of the house when due at the banks. He was directed to deliver one of the blanks to the promisor upon the note sued on in this action, to enable him to renew a note signed by him, then in the bank, of which the house were indorsers, and for which he had requested a blank to be left. The promisor called on the clerk for the blank indorsement left for him, and one was delivered to him ; afterwards, pretending that by some mistake it had become useless to him, and feigning to burn in the clerk's presence the name of the firm indorsed, he procured another blank, and, by a similar pretension and contrivance, a third and fourth, the last of which was in fact used for the purpose for which the house had directed a blank indorsement to be given to him. He had used one of the prior blanks for making the note sued on in this action ; which had been negotiated, with the indorsement remaining in blank, to the plaintiffs. *Parsons, C. J.* said : " It is objected that this note ought to be considered as a forgery of the names of the indorsers ; because a note was afterwards written on the face of the paper by the promisor, not only without the direction or consent of the defendants, but against their express instruction ; and therefore it was a false and fraudulent alteration of a writing, to the prejudice of the indorsers. This objection would have great weight, if, when the

the blank upon a certain condition, which had not happened ; (e) or that the authority was limited in point of time, and that the time had expired.(f) This we regard as the settled law in this country ; but in England, according to some recent decisions, it

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indorsers put the name of the firm on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement ; for then the paper would have been delivered over, unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery ; but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promisor, who by false pretences had obtained it, the fraudulent use of it would not be a forgery ; because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with a power of using these indorsements (although his discretion was confined) as a delivery by one of the house ; whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any one but to himself and to his principals. It is further objected, that, if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge the indorsers against an innocent indorsee. The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it ; but they make a distinction between the cases where the indorser through fraudulent pretences has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail. As if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here, one of two innocent parties must suffer. The indorsees confided in the signature of the defendants, and they could have no reason to suppose that it had been improperly obtained. The note was openly offered to the plaintiffs by a broker, and when they objected on account of the absence of both the indorsers, they were answered, on the information of the promisor, whose character then stood fair, that blank indorsements had been left with the clerk, and that the indorsers had before indorsed a number of notes for the same person, which had been negotiated by a broker. On the other hand, the loss has been occasioned by the misplaced confidence of the indorsers in a clerk, too young or too inexperienced to guard against the arts of the promisor." And see, to the same effects, *Roberts v. Adams*, 8 Port. Ala. 297 ; *Herbert v. Huie*, 1 Ala. 18 ; *Huntington v. Branch Bank*, 3 Ala. 186 ; *Decatur Bank v. Spence*, 9 Ala. 800.

(e) But see *infra*, p. 113, notes *g* and *h*.

(f) Thus, in *Montague v. Perkins*, C. B. 1853, 22 Eng. L. & Eq. 516, it was held, that a person, by giving another a blank acceptance, makes him, as to third parties, his general agent to fill up the bill to the extent the stamp will cover, and he is bound by his acceptance in the hands of an innocent holder for value ; therefore, to an action by an indorsee for value without notice against the acceptor, it is no defence that the acceptance was given in blank to the drawer, and that the bill was not filled up and issued

is not so certain. Thus, it has been directly decided there, that if the authority to fill the blank was upon a condition, which has not been satisfied, this will be a complete defence, even against

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until an unreasonable time (twelve years) after. During the argument, *Cresswell, J.*, interrupting counsel, said: "This does not differ from the case of a merchant employing an agent to sell a cargo of cotton for him, the agent being held out to the world as having a general authority to sell. His principal may have given him private instructions, but if, in selling, the agent violates his instructions, his principal is nevertheless bound." *Jervis, C. J.*, in delivering his opinion, said: "It is admitted by my brother *Channell*, that the giving a blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the time, to which the stamp extends; but he contends that the authority so given is an authority to fill it up within a reasonable time, and that as the authority in this case was not pursued in that respect, the party giving the acceptance is not liable. I think that is not the case with reference to the rights of a *bona fide* holder for value. The rules applicable to the question of authority on this bill of exchange do not differ from those which ought to govern the question, if it arose in the ordinary case between principal and agent. In the case of a blank acceptance, *prima facie* the person giving it gives the person to whom it is given an opportunity to fill it up for the amount and for the time limited by the stamp laws. As between those two, there may be secret stipulations binding upon them, but not binding as between the public and the person giving the blank acceptance. As said by Lord *Ellenborough*, in *Cruchley v. Clarence*, 2 Maule & S. 90, the defendant has chosen to send the bill into the world in that form, and the world ought not to be deceived by his acts. How does this differ from the ordinary case of an agent, held out to the public at large as competent to contract for and to bind his principal? The agent may have secret instructions, but, notwithstanding he deviates from them, the principal is bound by his acts. So here, the defendant, when he put the blank acceptance into *Swinburn's* hands, gave the latter power to issue it as if he had a general and unlimited authority; and the defendant must be bound by the acts of his agent to whom he gave this power. This is what is said by Lord *Mansfield*, in *Russel v. Langstaffe*, that an indorsement on a blank note is a letter of credit for an indefinite sum. The cases of *Temple v. Pullen*, 8 Exch. 389, and *Mulhall v. Neville*, 8 Exch. 391, are not at variance with this. For these reasons, I am of opinion that the rule must be absolute to enter the verdict for the plaintiff." *Maule, J.*: "I think so too. The defendant, when he wrote his name in blank and issued this acceptance, must have known, what was obvious to anybody, that he put it in the power of any person to whom he gave it to fill it up, and pass him off as having accepted the bill for any amount at any time warranted by the stamp. He must be taken to have intended the natural consequence of his act. If this were not so, and a *bona fide* holder were not to be protected, then a person who had used the utmost care might be subjected to a loss, in order to relieve another who had used no care, but had put the person to whom he gave the acceptance in a position to impose upon the most innocent and cautious. No case has been cited which decides the contrary; and I think we may without any conflict with previous cases, and in affirmance of a principle of mercantile law in favor of the negotiability of these instruments, and to protect innocent holders for value, decide that the defendant is liable, and that this rule should be made absolute." *Cresswell, J.*: "I entirely agree to this. A person who gives another possession of his signature on a bill stamp, *prima facie* authorizes the latter as his agent to fill it up, and give to the world the bill as accepted by him. He enables his agent to represent himself to

a *bona fide* holder.(g) So, if the authority be limited to a particular sum, and a larger sum be inserted, it has been decided by all the judges of England that this will be forgery.(h) We think the rule established in this country is just and rational.

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the world as acting with a general authority ; and he cannot say to a *bona fide* holder for value, who has no notice of any secret stipulations, that there were secret stipulations between himself and the agent, any more than can a principal, in the case already put, where he enables his agent, buying or selling on his behalf, to represent himself as acting under a general authority." See also *Temple v. Pullen*, 8 Exch. 389 ; *Mulhall v. Neville*, 8 Exch. 391.

(g) *Awde v. Dixon*, 6 Exch. 869. In this case, the defendant agreed to join his brother in making a promissory note for his accommodation, provided R. would also join. The defendant accordingly signed an instrument in the form of a promissory note, a blank being left for the name of the payee. R. refused to join, and afterwards the defendant's brother delivered the imperfect instrument to the plaintiff for value, representing that he had authority to deal with it, and the plaintiff's name was inserted as payee. *Held*, that the plaintiff could not recover on this note against the defendant ; and, *semble*, that, under such circumstances, the insertion of the plaintiff's name as payee rendered the instrument a forgery. *Parke*, B. said : " It is unnecessary to say whether this instrument is a forgery or not, but there is certainly ground for contending that the making of it complete, contrary to the directions of the defendant, renders it a false instrument as against him. I do not gainsay the position, that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover. But this is a different case. Here the instrument, to which the defendant's name is attached, is delivered to his brother, with power to make it a complete instrument, on one condition only, that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority, where, in case of a refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is, ' *Nemo plus juris in alium transferre potest quam ipse habet.*' It is a fallacy to say that the plaintiff is a *bona fide* holder for value ; he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority, consequently the instrument is void as against the defendant."

(h) *Rex v. Hart*, 1 Moo. C. C. 486 ; *Regina v. Wilson*, 1 Den. C. C. 284. In *Awde v. Dixon*, *supra*, *Parke*, B., interrupting counsel, said : " Suppose Richard Dixon had authority to fill up the instrument with £ 100, and he inserted £ 200, would the defendant be liable ? In the case of *Rex v. Hart*, all the judges were unanimously of opinion, that where a blank acceptance is delivered to a person, with authority to fill it up with a particular sum, and he inserts a larger sum, he is guilty of forgery. *Regina v. Wilson* is an authority to the same effect." *Alderson*, B. said : " A blank acceptance is not of itself an authority to make a complete bill, but only evidence of authority. *Molloy v. Delves*, 7 Bing. 429. Here the defendant signed his name to a piece of paper, giving his brother authority to make it a promissory note on certain

It should be noted, however, that it is confined to cases where the signature is *intrusted* to another person *for some purpose*. And we are inclined to think that it should be confined to cases where the person to whom the signature is intrusted is authorized to *fill the blank, in some form, or for some purpose*. If so, proof that he had no authority to fill the blank *in any form, or for any purpose*, would be a complete defence. As if a blank signature were given to a servant, to be carried to a bank and delivered to the cashier, and the servant should fill the blank and negotiate it. If a person sign notes in blank, and lock them up in his safe, whence they are stolen, filled up, and negotiated, without fault or negligence on his part, he is not liable.<sup>(i)</sup> Possibly, it might be held otherwise, if he make and sign a perfect note, payable to bearer, and it be stolen under similar circumstances ;

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terms ; he makes it a note on other terms ; then how does that differ from the case of signing his brother's name ? It would be strange if this transaction amounted to forgery, and yet we should hold this a true instrument."

(i) *Nance v. Lary*, 5 Ala. 370. In this case, the defendant and one Langford being about to execute a bond in blank, the latter produced a sheet of paper upon which the defendant signed his name, whereupon Langford suggested that the signature was so far from the bottom of the paper, that there might not be room for the bond to be written above it, and produced another sheet for the defendant to sign, so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had been or would be destroyed. Subsequently, Langford caused the note upon which the present suit was brought to be written over the blank signature of the defendant retained by him, and negotiated it to the plaintiff. *Collier, C. J.* said : "The making of the note by Langford was not a mere fraud upon the defendant ; it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who ever indulges the idle habit of writing his name for mere pastime, or leaves sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction." In *Montague v. Perkins*, C. B. 1853. 22 Eng. L. & Eq. 516, cited *supra*, *Cresswell, J.*, interrupting *Byles, Sergeant, arguendo*, said : "Suppose the defendant had lost his blank acceptance, would he have been liable upon it if the finder, without his authority, had filled it up ?" *Byles*. "Yes, to an indorsee for value, without notice ; as where A, by false representations, induced B to sign his name to a blank stamped paper, which A afterwards secretly filled up as a promissory note for £100, and induced C to advance him £100 on it, *Garrow, B. held*, that C had his remedy on the note against B. *Rex v. Revett, Byles on Bills*, 103, 6th edition." This case is stated too briefly to enable one to gather, with sufficient precision, the actual state of the facts. But if it is an authority for the proposition for which the learned Sergeant cites it, we think it unsound.

on the ground that, when the instrument is once perfected, (although it has never passed out of the maker's hands, and consequently has had no inception *as a contract*,) it is like *money*, and any one who receives it in good faith and for a valuable consideration acquires a perfect title.(j)

When a bill or note is given in blank, it is not necessary that the blank should be filled by the person to whom it is immediately intrusted. It may be negotiated in blank, and any *bona fide* holder may insert the amount advanced by him on the faith of the signature.(k)

If a note be made payable so many days or months after date, and the date be left blank, the maker will be bound, in favor of a *bona fide* holder without notice, by any date which the payee chooses to insert.(l) But if the payee, to accelerate the time of payment, inserts a date anterior to the time of making the note, it seems that it will be void in the hands of any party who received it with notice that it was antedated. The reasonable construction of such an instrument is, that it is to bear date only from the time when it is negotiated; and the face of the note is notice of this.(m)

A power to make notes for discount does not extend to the power of renewing the same notes.(n) And a power to put the

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(j) Worcester County Bank v. Dorchester & Milton Bank, 10 Cush. 488; Gould v. Segee, 5 Duer, 260. But see Hall v. Wilson, 16 Barb. 548, where an opinion was intimated, that until delivery the instrument was of no more effect than a blank piece of paper. The case was decided on another ground.

(k) Schultz v. Astley, 2 Bing. N. C. 544; Herbert v. Huie, 1 Ala. 18; Huntington v. Branch Bank, 3 Ala. 186.

(l) Androscoggin Bank v. Kimball, 10 Cush. 373; Mechanics' & Farmers' Bank v. Schuyler, 7 Cowen, 337, note a.

(m) Goodman v. Simonds, 19 Misso. 106. But see, *contra*, Mitchell v. Culver, 7 Cowen, 336.

(n) Ward v. Bank of Kentucky, 7 T. B. Mon. 93. A power to renew a note at sixty or ninety days will authorize the renewal of the note at eighty-eight days, there being no violation of the object and intention of the parties. Bank of So. Car. v. Herbert, 4 McCord, 89. See Bank of So. Car. v. M'Willie, 4 McCord, 438. But where A authorized B to sign his name to a note for \$ 250, payable in six months, and B put A's name to a note for that sum, payable in sixty days; it was *held*, that A was not liable. Batty v. Carswell, 2 Johns. 48. And an authority given by a father to his son to accept in his name a bill of exchange for \$ 2,000 to be used for a particular purpose, will not warrant him in accepting a bill for a part of the amount given for another purpose. Nixon v. Palmer, 4 Seld. 398. In Hortons v. Townes, 6 Leigh, 47, A, by letter of attorney, authorized B to put his name to or upon any negotiable note, as maker or indorser, for the purpose of getting the same discounted at one or other of certain



name of the principal to a note payable at a certain bank does not authorize the use of his name upon a note payable specifically elsewhere, or indeed upon any note not payable specifically at that bank.(o) Nor can supercargoes bind their principals by drawing a bill on the principals, and then accepting it in their name, without special authority to do so ; nor would the power to accept bills drawn on their principals by others, be derived from their employment as supercargoes.(p)

The same may be said of masters of ships (q) or steamboats.(r) Nor has an ordinary merchant's clerk any authority to bind his employer by signing a bill or note in his name.(s) Nor

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specified banks, to the amount of \$3,000, and then for renewal of such note at bank, from time to time, so as the amount shall, at no one time, exceed \$3,000. B made a note for \$3,000 accordingly, which was discounted at bank, and renewed from time to time, but was at length reduced to \$1,000 ; and then B purchased groceries of C, and for the price thereof gave him a note in A's name, negotiable at one of the specified banks. *Held*, that this last note was not within B's authority. And *semble*, that his authority was exhausted by the making of the first note for \$3,000.

(o) *Morrison v. Taylor*, 6 T. B. Mon. 82.

(p) *Scott v. M'Lellan*, 2 Greenl. 199.

(q) *Bowen v. Stoddard*, 10 Met. 375.

(r) *May v. Kelly*, 27 Ala. 497.

(s) *Terry v. Fargo*, 10 Johns. 114. In *Smith v. Gibson*, 6 Blackf. 369, it was *held*, that an agent for attending to and managing a grocery and provision store, &c., is not, in consequence of such agency, authorized to draw or indorse notes in the name of his principal. In *Davidson v. Stanley*, 2 Man. & G. 721, it was *held*, that the bailiff of a large farming establishment, through whose hands all payments and receipts take place, has no implied authority to pledge the credit of his employer by drawing and indorsing bills of exchange in the name of the latter. Nor, in the absence of all direct evidence of authority, does the nature of the employment of such a bailiff furnish any ground for inferring the existence of such an authority upon slight, or upon any other than clear and distinct, evidence of assent or acquiescence. In *Tappan v. Bailey*, 4 Met. 529, where a company was formed for the purpose of purchasing timber-land in Maine, and getting the lumber therefrom and selling it, and officers were appointed to take the general management of the concerns of the company, with power to appoint agents to transact its business ; it was *held*, that an agent appointed by such officers had authority to give a negotiable note of the company in payment for services of laborers employed by him in getting out lumber. It seems that an agent who is employed by the owners of a whale-ship to fit her for sea, and purchase the necessary supplies for her voyage, cannot bind the owners by making a negotiable note, or accepting a negotiable bill of exchange, in their names, as agent, in payment for such supplies. *Taber v. Cannon*, 8 Met. 456. In *the Bank of Hamburg v. Johnson*, 3 Rich. 42, the defendant established a large store in a country town, for the sale of groceries and purchase and sale of cotton, under the entire charge of W. as his agent, and gave public notice that W. would conduct the business and act as his agent in the purchase of goods and everything appertaining to his business in the mercantile line. W. sold cotton as defendant's agent, and, in order to enable the purchaser to raise money to pay for it,

has an attorney at law, to whom a note is sent for collection, any authority as attorney to transfer the note to a third person.<sup>(t)</sup> If the holder of a bill employ an agent to get it discounted, without restraining him as to the mode of doing it, an authority will be implied in the agent to indorse the bill in the name of the principal.<sup>(u)</sup> But if the principal expressly directs the agent to take the bill into the market and sell it, without indorsing it, and the agent, in violation of his orders,

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indorsed, in the name of his principal, a bill to be discounted by the purchaser in bank. The bill was discounted, and with the money thus raised the purchaser paid for the cotton. *Held*, that W. had not acted within the scope of his authority, and therefore that the defendant was not bound by the indorsement. So an agent employed in the manufacture of carriages has no authority, by implication from the nature of that business, to bind his principal by a negotiable note given for labor or materials. *Paige v. Stone*, 10 Met. 160. And see *Scarborough v. Reynolds*, 12 Ala 252. In *Beach v. Vandewater*, 1 Sandf. 265, it was *held*, that an agent of an association of canal forwarders, authorized by the articles to regulate the accounts of earnings, and the distribution of the same and of the expenses, to control the manner of running the boats, to sue for various duties undertaken by the parties, and to maintain offices for the transaction of the business, is not authorized to accept bills of exchange, so as to bind the associates. See *Layet v. Gano*, 17 Ohio, 466. In *Webber v. Williams College*, 23 Pick. 302, where an agent was authorized to advance a sum of money to a third person, and he, instead thereof, gave a note for the amount in the principal's name, it was *held*, that the principal was not liable on the note. In *Gould v. Norfolk Lead Co.*, 9 Cush. 338, it was *held*, that the payment of an unaccepted draft upon a corporation, by its agent, is no evidence of his authority to accept drafts upon the corporation; and the fact that such acceptor acted as general agent has little tendency to show such authority. *Shaw*, C. J. said: "The acceptance of a draft is an executory undertaking to pay it at a future day, and the authority to make such an agreement is not incident even to the authority of an agent to purchase and pay for goods. The authority to accept is one of a very high character, particularly in the case of a trading corporation, to whom business credit, and the use of that credit, are constantly necessary. It has been argued that such authority may be inferred from the course of trade, and the payment of unaccepted drafts upon the company, on other occasions. But this implication does not follow from such payments; for, either the agent had funds of the company for the purpose of paying such drafts, which does not imply that he had authority to pledge their credit, or he paid them from his own funds, relying on the credit of the company, and their previous undertaking and liability, to reimburse him for all his advances, which implies no authority whatever to bind them to a future payment of money by an acceptance. I shall not go into an examination of the cases on this subject, but will refer to that of *Webber v. Williams College*, 23 Pick. 302, where the question was much considered, and many cases were cited. The case of *Emerson v. Providence Hat Manuf. Co.*, 12 Mass. 237, goes to the point that constituting one a buying and selling agent of a trading company does not imply authority in him to give the negotiable note of the company."

(t) *Russell v. Drummond*, 6 Ind. 216.

(u) *Fenn v. Harrison*, 4 T. R. 177.



indorses in the name of the principal, the latter will not be liable on this indorsement, even in the hands of a *bona fide* holder.(v)

It is said that the usage of trade authorizes a merchant, making a shipment, to draw on the consignee, and binds the consignee to pay the bills if the shipment supplies him with funds. But an agent who is authorized to draw on his principals for the sums he advances on merchandise consigned to them, is not thereby authorized to draw on them on account of goods of his own which he consigns to them. In relation to these goods, he has the general rights of a merchant shipping goods, and no other.(w) A power to give a "company note" was held to include the power of drawing a bill in the name of the "company."(x) That any principal may limit any authority which he gives, precisely as he thinks proper, is unquestionable.

If an authority be given in very general terms, and the same instrument enumerates certain special objects or acts, this specification will be held to restrain the general words, and the instrument will be construed as if limited in its intention and operation to them, unless there be some phraseology in the instrument, or something in the nature of the case, which distinctly controls this rule of construction.(y)

If one enters into a contract as agent for another, he cannot enforce that contract in his own name and for his own benefit, as if made by himself and for himself, without giving sufficient previous notice to the other party of his purpose so to do. But with that notice, it seems that he may maintain an action on the contract in his own name, if the facts are such in other respects as would authorize him in doing so.(z)

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(v) *Fenn v. Harrison*, 3 T. R. 757.

(w) *Schimmelpennich v. Bayard*, 1 Pet. 264.

(x) *Tripp v. Swanzey Paper Co.*, 13 Pick. 291.

(y) Thus, in *Rossiter v. Rossiter*, 8 Wend. 494, it was *held*, that a power of attorney to collect debts, to execute deeds of lands, to accomplish a complete adjustment of all concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, did not authorize the giving of a note by the attorney in the name of the principal. The larger powers, conferred by the general words, must be construed with reference to the matters specially mentioned. And see *ante*, p. 105, *et seq.*

(z) *Bickerton v. Burrell*, 5 Maule & S. 383; *Rayner v. Grote*, 15 M. & W. 359.

If an agent exceed his authority in signing the name of his principal to a note, the note will be void as to the principal, even in the hands of a *bona fide* holder.(a)

Any person who receives bills or notes for collection, or for any other specific purpose, must be controlled by any directions or limitations expressed upon them, and cannot apply the proceeds to his own benefit, in any way inconsistent with those directions or limitations; nor can he by assignment or indorsement convey the property in the paper to any one who has notice or knowledge that he therein transcends his authority.(b) So an agent or broker, who has notes or bills of another to get them discounted, cannot pledge them for money previously due from him; nor, as it would seem, could he be justified by any usage in doing so.(c) On general principles it might be said that he could not pledge them for money paid him, if the lender knew, or had sufficient reason to know, both that the notes belonged to another, and that the broker, against the purposes of the owner, was borrowing money on them for himself. Nor can he, without specific authority, pledge the bills of different customers in one mass, for this subjects each note to a lien for money advanced on the rest. But to this point it has been said that usage might enlarge the broker's authority.(d)

It has been said, on high authority, that any person taking an acceptance which purports to be by procuration, takes it on the credit of the party who assumes to have authority to accept, and should, therefore, in the exercise of due caution and reasonable prudence, require the production of the au-

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(a) *Fearn v. Filica*, 7 Man. & G. 513; *Andover v. Grafton*, 7 N. H. 298, 303. In *Mechanics' Bank v. New York & New Haven R. R. Co.*, 3 Kern. 631, *Comstock, J.* says: "It is obvious, upon a moment's reflection, that negotiability can impart no vitality to an instrument executed under a power, where the agent has exceeded his actual or presumptive authority. Whoever proposes to deal with a security of any kind appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry he deals at his peril."

(b) *Ancher v. Bank of England*, 2 Doug. 638; *Sigourney v. Lloyd*, 8 B. & C. 622, 5 Bing. 525.

(c) *Haynes v. Foster*, 2 Crompt. & M. 237; *Foster v. Pearson*, 1 Crompt. M. & R. 849.

(d) *Haynes v. Foster*, *supra*; *Foster v. Pearson*, *supra*.

thority.(e) But it may be doubted whether the not requiring the production of this authority would, of itself and of necessity, be such an act of negligence as to affect his rights; although such seems to be the view held in some cases.

The unauthorized delivery of bills or notes payable to bearer gives a *bona fide* holder the property in them, and a right to call on all prior parties.(f) And the same rule applies to negotiable notes or bills which are indorsed in blank; for these are equally transferable by delivery alone.

One having a general authority as agent, or a special authority unlimited as to time, may be presumed to possess that authority until there be notice of revocation.(g) This notice may be express, and proved by direct evidence; or it may be inferred from any circumstances, such as change of residence, or of business, or lapse of time, or of any other kind, always provided they are such as would suggest this revocation or cessation of authority to a man of ordinary intelligence and prudence.(h) So the notice may be direct to the party dealing with the agent, or general, by advertisement in a public paper, and then the knowledge of it must be brought home to

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(e) *Attwood v. Munnings*, 7 B. & C. 278. *Bayley, J.*: "This was an action upon an acceptance importing to be by procuration, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority." *Holroyd, J.*: "The word 'procuration' gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given." *Littledale, J.*: "It is said that third persons are not bound to inquire into the making of a bill; but that is not so where the acceptance appears to be by procuration." See *Withington v. Herring*, 5 Bing. 442. In *Alexander v. Mackenzie*, 6 C. B. 766, it was *held*, that the acceptance or indorsement of a bill of exchange expressed to be "per procuration" is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority.

(f) *Miller v. Race*, 1 Burr. 452.

(g) In — *n. Harrison*, 12 Mod. 346, a servant had power to draw bills of exchange in his master's name, and afterwards was turned out of the service. *Holt, C. J.*: "If he draw a bill in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill, in those cases, shall bind the master."

(h) See 1 Parsons on Cont. 58, *et seq.*

him by such reasonable evidence, as that he takes the paper, or reads it regularly, or was known to have examined that very paper.(h)

Death operates as a revocation of every agency or authority which is not coupled with an interest, and in that way vested in the agent. Even in that case, the death of the principal revokes the authority so far that the agent can no longer use the name of the principal, and must require the representatives of the deceased to act for him. But if the authority be one which the agent can execute in his own name, and be also coupled with an interest, it is unaffected by the death of the party. Whatever be the nature, ground, or extent of the authority to act for another in *his* name, we should say, on general principles, that his name, put to any negotiable paper, or indeed to any instrument, after his death, although in ignorance and good faith, was a nullity.(h)

One who purports to act as an agent, but who transcends his authority, or has no authority, is, as we have seen, personally liable; but not as a party to the note or bill which he so signs, indorses, or accepts, if he signed expressly as agent; as, for example, "A, by B, his attorney." If B is not A's attorney, there is, strictly speaking, no signature to the note; and B is only liable for pretending to make a note when he did not. But there are authorities which hold that here is a note, and some one must be held upon it, and, as A cannot be, B must be.(i)

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(h) See 1 Parsons on Cont. 58, *et seq.*

(i) The authorities upon this point cannot be reconciled. In *Polhill v. Walter*, 3 B. & Ad. 114, it was *held*, that the defendant, who had accepted a bill for one Hancorne without authority, was liable in a special action on the case, but not as acceptor. This was upon the ground that no one can be liable as acceptor but the person to whom the bill is addressed. In *Wilson v. Barthrop*, 2 M. & W. 863, the defendant, who was the agent and clerk of a firm, drew a bill of exchange, and signed thereto the name of the firm. *Held*, that the defendant was not liable as the drawer in an action on the bill, his name not being affixed to it, without some proof that he had no authority to draw bills in the name of the firm, or that he had not acted *bona fide*. And *quære*, whether, if it had been proved that he had no such authority, he would have been liable in an action upon the bill. In *Long v. Colburn*, 11 Mass. 97, a promissory note was subscribed thus: "Pro William Gill. J. S. Colburn." *Held*, that this was the promise of Gill, if Colburn had the authority to make it; and if not, that he would be liable to the promisee in a special action on the case. In *Ballou v. Talbot*, 16 Mass. 461, the defendant made a promissory note, subscribed with his own name, but added to his signature the words, "agent for David Perry." *Held*, that the defendant was not liable

As a general rule, one who acts professedly as a public agent, and had authority so to act, is not liable, although the public fail to perform the contract, unless circumstances indicate that it was understood between him and the party dealing with him that the contract was made on his personal credit. As, for example, that an officer charged with the erection of some public building induced laborers to engage in it by his promise that their wages should be paid at all events, and whether funds were provided or not. So if he drew bills or gave notes for the public, but with

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on the note. If he acted without authority from Perry, he was liable in a special action on the case. In *Jefts v. York*, 4 Cush. 371, the defendant made a promissory note beginning, "For value received, the pastor and deacons of — Church, in behalf of said church, promise," &c. (Signed,) "S. D. York, agent for — Church." *Held*, that the defendant was not personally liable on the note, though he gave it without authority. *Bigelow, J.* said: "It is impossible, upon any legal ground, to construe the instrument as the individual note of the defendant. Had it been a note of this tenor, 'I promise to pay A. B. one hundred dollars. S. D. York, agent for the Free-will Baptist Society,' it might be plausibly contended, that, if the agency was unauthorized, all the description of agent, &c. might be rejected, and the note be treated as the individual note of York. But the note is in no sense, and in no manner of reading it, a promissory note of York. In this instance, the body of the note contains the name of the promisor, who alone is the stipulated party to the promise contained in the note." See same case, 10 Cush. 392. In *Grafton Bank v. Flanders*, 4 N. H. 239, where A put the name of B to a promissory note without any authority from B, and the note was delivered to the payee for a valuable consideration, it was *held*, that under these circumstances the law would presume that A intended to bind himself; that he might so bind himself; and that he was liable in an action against him in his true name on the note, upon a count alleging that he made the note by the name of B. *Sed quere.* In *Savage v. Rix*, 9 N. H. 263, in an action on a promissory note, it was *held*, that if an agent, in making a contract, fail to execute it in such a manner as to bind his principal, but use apt words by which to make a contract for himself, whatever there may be which indicates that he might be an agent must be regarded as description, and he will be liable as on his own personal contract. In *Dusenbury v. Ellis*, 3 Johns. Cas. 70, the defendant, having no authority for the purpose, made a promissory note, beginning, "I promise," &c. (Signed,) "For Peter Sharpe, Gabriel Dusenbury, attorney." *Held*, that the defendant was personally liable on the note. The court said: "If a person, under pretence of authority from another, executes a note in his name, he is bound; and the name of the person for whom he assumed to act will be rejected as surplusage." In *Palmer v. Stephens*, 1 Denio, 471, the defendant, without authority, made a promissory note, and signed thereto the name of Gideon Stephens, writing his own initials under the signature. *Held*, that the defendant was personally liable on the note. In *Ormsby v. Kendall*, 2 Ark. 338, the defendant gave a note, beginning, "Steamer Tecumseh and owners promise," &c. (Signed,) "F. C. Kendall." *Held*, that the defendant was personally liable on the note, unless he showed that he had authority to contract for the steamer and owners. See further, *Roberts v. Button*, 14 Vt. 195; *Bank of Hamburg v. Wray*, 4 Strobb. 87; *Johnson v. Smith*, 21 Conn. 627. And see 1 *Parsons on Cont.* 57, note *f*.

the same personal assurance, or guaranty; or if such assurance could be implied from the nature of the case.(j)

## SECTION V.

### OF PARTNERS.

THE relation of partnership, and the law which grows out of, and which regulates, that relation, are very peculiar. Partly, it is the law of agency, because each partner is the agent of the whole firm, with full power to represent all the members, in all transactions which relate to the business of the copartnership. Partly, it is the law of property, because the several partners own jointly all the copartnership property. It is, in fact, a system of law excellently adapted to its precise scope and purpose, and peculiar thereto.

A partnership exists when two or more persons combine their property, labor, and skill, or one or more of these, in the transaction of business, for their common profit.

The law clothes each partner with authority to bind all the partners in all business transactions which actually concern the firm; or which are so far within the scope of the actual or pretended business of the firm as to justify third parties in believing them to belong to the business of the firm. And this applies to signing, indorsing, accepting, presenting, demanding and receiving payment of, and discharging negotiable paper. And a partner who accepts, in his own name, a bill drawn on a firm, binds the firm.(k) Nor is it any objection to a note given in good faith

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(j) See 1 Parsons on Cont. 104, *et seq.*

(k) *Mason v. Rumsey*, 1 Camp. 384. In this case the bill was drawn upon "Messrs. Ramsey & Co.," and accepted by T. Rumsey, Sen. It was contended for the defendant, that, "if a bill was drawn upon a firm, it must be accepted in the name of the firm, or by one partner for himself and his copartners; otherwise the holder might protest the bill, as the mere signature of a single partner was binding only upon himself." But Lord *Ellenborough* said: "There is no foundation for the doctrine contended for. This acceptance does not prove the partnership; but if the defendants were partners, they are both bound by it. For this purpose it would have been enough if the word 'accepted' had been written on the bill, and the effect cannot be altered by adding 'T. Rumsey, Sen.' If a bill of exchange is drawn upon a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his copartners, and to accept the bill according to the terms in which

for a partnership debt, that it was given without the knowledge of the other partners.<sup>(l)</sup> And the signature of a partner, in the name of the firm, to negotiable paper, for a transaction not in their business, or their line of business, would bind the firm, if the proceeds thereof were received and held by the firm, because this would be a ratification.<sup>(m)</sup> But if the other partners did not know of the transaction at the time, and, as soon as they did, gave up the proceeds and repudiated the contract, this would discharge them. A considerable delay in giving notice of their dissent, after they are informed of the transaction, would be equivalent to their assent, and would bind them accordingly.<sup>(n)</sup>

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it is drawn " In *Jenkins v. Morris*, 16 M. & W. 877, a bill was drawn on "E. M. and others, Trustees of Clarence Temperance Hall, Liverpool," and accepted thus: "Accepted, E. M." The defendants, with E. M. and another, were the trustees of a body of persons associated together for the purpose of building the Temperance Hall. E. M. had authority from all the trustees to accept the bill on their behalf. *Held*, that the defendants were bound by the acceptance, though it did not show on the face of it that E. M. intended to accept, not individually, but for himself and four others. *Pollock*, C. B. said: "Mundy accepted the bill, and the jury found that he had authority from all the trustees to do so. Then his acceptance did not import that he accepted merely as an individual, but that he was the party whose hand performed that duty by direction of the rest; and the mere fact that he needlessly added his name to the acceptance made no difference." In *Dougal v. Cowles*, 5 Day, 511, it was *held*, that the act of drawing a bill of exchange, by one partner in his own name, upon the firm of which he is a member, for the use of the partnership concern, is, in contemplation of law, an acceptance of the bill, by the drawer, in behalf of the firm; and the holder of the bill may sustain an action thereon against the firm, as for a bill accepted. And see *Beach v. State Bank*, 2 Ind. 488.

<sup>(l)</sup> *Smith v. Lusher*, 5 Cowen, 688.

<sup>(m)</sup> In *Richardson v. French*, 4 Met. 577, where an administrator, who was a member of a partnership, applied to the concerns of the partnership money which belonged to the estate of his intestate, and afterwards gave the note of the firm to the creditor of the intestate, to whom such money was due, in discharge of such creditor's claim upon the estate of the intestate; it was *held*, that the firm was liable on the note, although the money was not in the hands of the firm when the note was given. And see *Jaques v. Marquand*, 6 Cowen, 497; *Whitaker v. Brown*, 11 Wend. 75, 16 Wend. 505; *Clay v. Cottrell*, 18 Penn. State, 408.

<sup>(n)</sup> Thus, in *Foster v. Andrews*, 2 Penn. 160, it was *held*, that if a note be given by one partner in the name of the firm, for his own private debt, and the other partner, upon being informed of the transaction, does not dissent or give notice to the payee that he will not be liable, he shall be bound. But in *Elliott v. Dudley*, 19 Barb. 326, it was *held*, that to render the firm liable under such circumstances, where there has been no previous usage to justify such a use of the partnership name, their subsequent assent must be proved; that proof of knowledge of the transaction on their part, after it has taken place, and nothing more, is no proof of assent; that they are not bound to deny their liability until they are prosecuted. In *Gansevoort v. Williams*, 14 Wend. 133, it was *held*, that where one member of a mercantile firm gives a note in the name



If a partner by his signature defrauds the firm, this does not discharge them from their liability to an innocent third party, because their entering into partnership with the wrong-doing partner enabled him to commit the fraud. (*o*) Not so where the third party is not innocent, but is party or privy to the fraud; for then the firm is discharged. Thus, if one partner signs or indorses a note with the partnership name, but in payment or security of his private debt, and the taker knows it to be so, the other partners are not bound without their assent, or some act which justified the taker in supposing their assent; (*p*) and the

of the firm for his individual debt, the assent of the firm may be implied from facts and circumstances; an express assent need not be shown. In *Mercein v. Andrus*, 10 Wend. 461, it was *held*, that a partner is not liable to the payment of a note indorsed by his copartner in the name of the firm, out of the course of the partnership concerns, although he be present and hear the arrangement respecting the indorsement; his assent must be proved, and will not be presumed. And see *Sweetser v. French*, 2 Cush. 309.

(*o*) *Catskill Bank v. Stall*, 15 Wend. 364; *Whitaker v. Brown*, 16 Wend. 505; *Hawes v. Dunton*, 1 Bailey, 146; *Bascom v. Young*, 7 Misso. 1; *Cotton v. Evans*, 1 Dev. & B. Eq. 284; *Winship v. Bank of United States*, 5 Pet. 529; *Flemming v. Prescott*, 3 Rich. 307; *Miller v. Manice*, 6 Hill, 115; *Duncan v. Clark*, 2 Rich. 587; *Emerson v. Harmon*, 14 Maine, 271; *Waldo Bank v. Lumbert*, 16 Maine, 416; *Parker v. Burgess*, 5 R. I. 277; *Hopkins v. Boyd*, 11 Md. 107. In *Arden v. Sharpe*, 2 Esp. 524, Lord *Kenyon* said: "One partner certainly may indorse a bill in the partnership name; and if it goes into the world, and gets into the hands of a *bona fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable." And see next note.

(*p*) The principle is clearly stated by Lord *Kenyon* in *Wells v. Masterman*, 2 Esp. 731: "When a man enters into a partnership, he certainly commits his dearest rights to the discretion of every one who forms a part of that partnership in which he engages; and if a bill is drawn upon the partnership in their usual style and firm, and it is accepted by one of the partners, it certainly binds the partnership to the payment of it; but if a man has dealings with one partner only, and he draws a bill on the partnership on account of those dealings, he is guilty of a fraud, and in his hands the acceptance made by that partner would be void; but it would be otherwise in the case of a *bona fide* indorsee. In his hands, the acceptance of one of the partners binds the partnership, as he is ignorant of the circumstances under which it was created, and takes it on the credit of the partnership name." To the same effect is *Shirreff v. Wilks*, 1 East, 48. It was there *held*, that two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, could not bind him without his assent by accepting a bill drawn by the creditor upon the firm in their joint names; but such security is fraudulent and void as against the third partner. And see *Ex parte Goulding*, 2 Glyn & J. 118; *Ex parte Bonbonus*, 8 Ves. 540; *Green v. Deakin*, 2 Stark. 347. The same rule is settled in this country by a great number of cases. See *Livingston v. Hastie*, 2 Caines, 246; *Lansing v. Gaine*, 2 Johns. 300; *Livingston v. Roosevelt*, 4 Johns. 251; *Dob v. Halsey*, 16 Johns. 34; *Foot v. Sabin*, 19 Johns. 154; *Lavery v. Burr*, 1 Wend. 529; *Williams v. Walbridge*, 3 Wend. 415; *Bank of*



admissions of the partner signing are no evidence to prove the assent of the others. (q) In this country it is clearly settled that the taker must prove the assent of the other partners, for *prima facie* such a transaction is a fraud both on the part of the debtor

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*Rochester v. Bowen*, 7 Wend. 158; *Gansevoort v. Williams*, 14 Wend. 133; *Joyce v. Williams*, 14 Wend. 141; *Wilson v. Williams*, 14 Wend. 146; *Whitaker v. Brown*, 16 Wend. 505; *Huntington v. Lyman*, 1 D. Chip. 438; *Chazournes v. Edwards*, 3 Pick. 5; *Munroe v. Cooper*, 5 Pick. 412; *Baird v. Cochran*, 4 S. & R. 397; *Cotton v. Evans*, 1 Dev. & B. Eq. 284; *Weed v. Richardson*, 2 Dev. & B. 535; *Mauldin v. Branch Bank*, 2 Ala. 502; *Smyth v. Strader*, 4 How. 404; *Long v. Carter*, 3 Ired. 238; *N. Y. F. Ins. Co. v. Bennett*, 5 Conn. 574; *Andrews v. Planters' Bank*, 7 Smedes & M. 192; *Rogers v. Batchelor*, 12 Pet. 221; *Clay v. Cottrell*, 18 Penn. State, 408; *Lanier v. McCabe*, 2 Fla. 32. In *Livingston v. Roosevelt*, 4 Johns. 251, it appeared that in 1803 A and B entered into partnership as sugar-refiners, and published in two of the Gazettes printed in the city of New York (and which were taken by C), that they had entered into partnership in the sugar-refining business, under the firm of A & Co. In April, 1805, B, without the knowledge or consent of A, purchased a quantity of brandy of C, for which he gave his individual note payable to the firm, and indorsed by him with the name of the firm. The bill of parcels, by the direction of B, was made out in his name only, and the brandies were shipped to the West Indies in a vessel belonging to B, and on his own account; and C, in order to obtain the drawback, made oath at the custom-house that the brandy was sold to B. A and B had entered the name of the firm at two of the banks in the city of New York, and B drew checks and made and indorsed notes in the name of the firm, which were regularly paid, and the banks had considered A and B as general partners. C, when he sold the brandy, required the partnership security, and it did not appear that he knew of the limitation, until after its dissolution in June, 1805, notice of which was also published in two of the newspapers. *Held*, that the partnership was not liable on the note. In *Davenport v. Runlett*, 3 N. H. 386, R. and T. were partners in trade, and while they were thus partners, T. boarded with D. and gave to the latter a note, in the name of the firm, for the price of the board, without the knowledge of R. *Held*, that the personal expenses of partners could not be presumed to be a partnership concern, and that R. could not be held upon the note, until the plaintiff should show affirmatively that T. had authority thus to bind the firm. In *Gansevoort v. Williams*, 14 Wend. 133, where, upon the renewal of an accommodation note, the borrower presented to his accommodation indorser for signature a note to which he had affixed the name of a firm of which he had recently become a member, as makers; it was *held*, that the indorser was chargeable with notice that the note was given for the individual debt of the borrower, and could not, upon the dishonor of the note, recover against the firm. In *Tanner v. Hall*, 1 Penn. State, 417, where a partner made a note in his own name in favor of a third person, who indorsed it for his accommodation, and the partner then added the indorsement of his firm, and had the note discounted at a bank and the proceeds carried to his separate account; it was *held*, that the bank was chargeable with notice that the transaction was not within the course of the partnership business. And see *Manning v. Hays*, 6 Md. 5. In *Cooper v. McClurkan*, 22 Penn. State, 80, where a partner drew a bill of exchange in the name of the firm on himself, payable to the order of the firm, accepted it in his own name, indorsed it in the name of the firm, and placed it in the hands of a bill-broker,

(q) *Hickman v. Reineking*, 6 Blackf. 387.

and the creditor.(r) In England, it seems, perhaps, that this authority is presumed until they prove the contrary.(s) We have some doubt, however, whether the authorities which indicate this can be sustained upon any well-established principle; and we regard them as departing from the rule applied by Lord *Kenyon* and Lord *Eldon*.(t)

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who negotiated it; it was *held*, that the form of the bill was sufficient to put the holder upon inquiry, and that the firm might defend by showing that it was not a partnership transaction, but that the bill was drawn and negotiated by the partner for his individual use. But in *Ihmsen v. Negley*, 25 Penn. State, 297, where an individual, who was a member of two firms, made a note in the name of one firm, payable to himself, and indorsed it with the name of the other firm; it was *held*, that this was not such a case as to require the plaintiff, a holder for value before maturity, to prove the assent of the partners to such indorsement, or that the proceeds were applied to the benefit of the firm. See *Murphy v. Camden*, 18 Misso. 122. And see *ante*, p. 108, note *w*.

(r) *Dob v. Halsey*, 16 Johns. 34; *Foot v. Sabin*, 19 Johns. 154; *Sweetser v. French*, 2 Cush. 309; *Kemeys v. Richards*, 11 Barb. 312; *Noble v. M'Clintock*, 2 Watts & S. 152; *Mecutchen v. Kennady*, 3 Dutch. 230. And see cases, *supra*.

(s) We state this upon the authority of *Swan v. Steele*, 7 East, 210, and *Ridley v. Taylor*, 13 East, 175.

(t) In *Swan v. Steele*, A, B, and C traded under the firm of A & B in the cotton business, C not being known to the world as a partner; and A & B traded as partners alone under the same firm in the business of grocers, in which latter business they became indebted to D, and gave him their acceptance, which, not being able to take up when due, they, in order to provide for it, indorsed in the common firm of A & B a bill of exchange to D, which they had received in the cotton business, in which C was interested; but such indorsement was unknown to C, of whom D, the indorsee, had no knowledge at the time. *Held*, that such indorsement in the firm common to both partnerships of a bill received by A & B in the cotton business bound C, their secret partner in that business, and that consequently C was liable to be sued by D on such indorsement, the latter not knowing of the misapplication of the partnership fund at the time. In *Ridley v. Taylor*, it was *held*, that if one partner draw or indorse a bill in the partnership name, it will *prima facie* bind the firm, although passed by the one partner to a separate creditor in discharge of his own debt; unless there be evidence of covin between such separate debtor and creditor, or at least of the want of authority, either express or to be implied, in the debtor partner to give the joint security of the firm for his separate debt. Lord *Ellenborough* placed considerable reliance upon the special circumstances of the case. He said: "This bill had an existence, according to its apparent date, eighteen days before the time of its delivery to the plaintiffs; it was drawn for a sum considerably exceeding the debt, and was not only drawn and indorsed, but accepted also, before it was produced to them; and although it is stated in the case, that in fact the bill was drawn and indorsed by Ewbank in the partnership firm, it does not appear that the plaintiffs knew that it was drawn and indorsed by him. Under these circumstances it might reasonably be supposed, by the party to whom it was given, to be a partnership security, of which Ewbank, the partner in possession of it, had for some valuable consideration, or in virtue of some arrangement with Ord, the other partner, become the proprietor, so as to be authorized to deal with it as his own. At any rate, the contrary does not either actually or presumptively appear." See *Green v. Deakin*, 2 Stark. 347.

One who indorses such a note as surety, in the belief that it is good against the partnership, will not be liable to a holder who knew that it was made for the private debt of one partner, without the authority or assent of the rest.<sup>(u)</sup> If the surety, when he indorsed the note, knew the circumstances under which it was made, he will be liable; but the burden of proof is on the holder to show that the surety had this knowledge.<sup>(v)</sup>

A bill or note made by one partner in the name of the firm, will be presumed to have been made in the course of partnership dealings; and if the other partners seek to avoid its payment, the burden of proof lies upon them to show that it was given in a matter not relating to the partnership business, and that with the knowledge of the payee.<sup>(w)</sup> And it is immaterial as to this, whether the partnership be a limited or a general one.<sup>(x)</sup>

If the action be brought by a subsequent indorsee against the partnership, and the defendants show that the note was executed in fraud of the firm, as between the partner executing it and the payee, it has been held, in this country, that this will throw the burden of proof upon the plaintiff to show that he came by the note fairly, and without knowledge of the fraud.<sup>(y)</sup> But it has been held otherwise in England.<sup>(z)</sup>

(u) *Livingston v. Hastie*, 2 Caines, 246; *Chazournes v. Edwards*, 3 Pick. 5; *Williams v. Walbridge*, 3 Wend. 415. See *Bowen v. Mead*, 1 Mich. 432.

(v) *Chazournes v. Edwards*, 3 Pick. 5.

(w) *Doty v. Bates*, 11 Johns. 544; *Whitaker v. Brown*, 16 Wend. 505; *Foster v. Andrews*, 2 Penn. 160; *Ensminger v. Marvin*, 5 Blackf. 210; *Knapp v. McBride*, 7 Ala. 19; *Thurston v. Lloyd*, 4 Md. 283; *Manning v. Hays*, 6 Md. 5; *Hamilton v. Summers*, 12 B. Mon. 11.

(x) *Barrett v. Swann*, 17 Maine, 180; *Holmes v. Porter*, 39 Maine, 157.

(y) *Munroe v. Cooper*, 5 Pick. 412; *Bank of St. Albans v. Gilliland*, 23 Wend. 311; *Bank of Vergennes v. Cameron*, 7 Barb. 143. And see *post*, chapter on Holder.

(z) *Musgrave v. Drake*, 5 Q. B. 185. In this case it was proved that all the defendants were partners, and that one of them, who had suffered judgment by default, had accepted the bill in the name of the firm, in fraud of the partnership, and not for partnership purposes. *Held*, that such proof, without evidence of knowledge on the part of the plaintiff, did not oblige him to prove the circumstances under which the bill was indorsed to him. The question arose, under the new rules of pleading, upon an issue joined upon a plea of *non accepit*. Lord Denman said: "We have taken pains to ascertain what, as understood in the other courts, would be the course at Nisi Prius on the trial of such an issue as this. We find that the other courts agree in our view, which is this: Where issue is joined on a plea of *non accepit*, and the proof offered of the acceptance is the signature of one partner competent to bind the firm, then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet if the proof does not affect the plaintiff with knowledge of the fraud, that does not

The authority of one partner to bind another, by signing bills and notes in their joint names, is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the party signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied.(a)

It has been held, that if a bill was accepted in a partnership name, and the proceeds were intended and applied for the exclusive benefit of the partner signing it, with the knowledge of the holder as to a part of the proceeds, he can recover of the partnership the remainder of the bill, in relation to which he did not know that it was applied to the private benefit of one partner alone, on the ground that the objection of fraud does not apply to this part.(b) But we think this decision open to question.

It has also been held, that a note in the words, "I promise to pay," &c., signed by one member of a firm for the rest, as

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put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction." But see *Grant v. Hawkes*, Chitty on Bills, 9th ed., 42, note c.

(a) *Gallway v. Mathew*, 10 East, 264, 1 Camp. 403. Lord *Ellenborough* said: "The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority; and that implication was rebutted in this instance by the notice given by *Smithson*, who is now sought to be charged, which reached the plaintiff, warning him that *Mathew* had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done, and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others." See further, *King v. Faber*, 22 Penn. State, 21; per *Calden*, Senator, in *Smith v. Lusher*, 5 Cowen, 688; 1 Parsons on Cont., pp. 157, 158.

(b) *Wintle v. Crowther*, 1 Crompt. & J. 316. See *Wilson v. Lewis*, 2 Man. & G. 197. In *Gamble v. Grimes*, 2 Ind. 392, a bill of exchange was drawn on a firm, and was accepted by one of the partners in the name of the firm. The bill included an individual debt due by the partner accepting, and also a debt due by the firm. Held, that the drawers of the bill could recover on the bill the amount of the firm debt included in it. In *King v. Faber*, 22 Penn. State, 21, it was held, that a partner cannot render a firm liable for a note for his individual debt, by including within it a debt of the firm forming a small portion of it.

"A. B., for C. D., E. F.," &c., will bind the whole firm.(c) So if the note begin, "I promise to pay," &c., and be signed with the partnership name, as "A. B. & Co.," it will bind the firm.(d)

A partner drawing bills or notes for the firm in a fictitious name, and indorsing them with the partnership name, the proceeds being applied to partnership purposes, binds all the partners by the indorsement.(e) And so he does, it seems, although the money be not so applied, if the bills or notes were indorsed to a *bona fide* holder, in the line of the firm's business. But if a bill is drawn by one partner in his own name, and the name or style of the copartnership is not on the paper, the members of the firm will not be liable as drawers, even if the purpose of the bill was to raise money for the firm, and the money was so applied.(f)

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(c) *Gallway v. Mathew*, 10 East, 264, 1 Camp. 403; *Staats v. Howlett*, 4 Denio, 559. In *Hall v. Smith*, 1 B. & C. 407, where a promissory note beginning, "I promise to pay," was signed by one member of a firm for himself and his copartners; it was *held*, that the holder might charge either the signing partner or the firm, at his election. But this case was overruled in *Ex parte Buckley, in re Clarke*, 14 M. & W. 469, where it was *held*, that the holder of such a note had not a separate right of action against the partner so signing, but that the firm alone were liable. *Parke, B.* said: "This is *prima facie* a promise by one partner, for himself and the other three partners, and it amounts to one promise of the four persons constituting the firm; and if Mitchell had authority, the firm is bound. I really must say that I think *Hall v. Smith* cannot be supported. The partner, in making the promise, is only an agent for the firm. Then does it bind him personally, or does it bind the firm? No doubt the instrument was intended to bind the firm; and as he had authority as a partner to do it, it had that effect." See *MacLae v. Sutherland*, 3 Ellis & B. 31; *Ex parte Christie*, 3 Mont. D. & De G. 736.

(d) *Doty v. Bates*, 11 Johns. 544.

(e) *Thicknesse v. Bromilow*, 2 Crompt. & J. 425.

(f) *Siffkin v. Walker*, 2 Camp. 308. In this case it was *held*, that if a promissory note appears on the face of it to be the separate note of A only, it cannot be declared on as the joint note of A and B, though given to secure a debt for which A and B were jointly liable. Lord *Ellenborough* said: "How can I say that a note made and signed by one in his own name is the note of him and another person neither mentioned nor referred to?" In *Emly v. Lye*, 15 East, 7, where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker, and the proceeds were carried to the partnership account; it was *held*, that the banker had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; the money having been advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loan to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account. And see *Ex parte Emly*, 1 Rose,

It sometimes happens that the business of the copartnership is conducted under the name of one of the partners, the firm having no other name or style; and then it may be difficult to discriminate between notes made or indorsed by him as an individual, and those intended to bind the copartnership. From the reason of the case and the authorities, the following rules may be applicable to questions of this kind.

In the first place, if the partner signs the paper in the business of the firm, and intending to sign as a partner, this is the firm's paper.<sup>(g)</sup> And if the paper be signed in fact in the business and for the benefit of the firm, the other partners cannot deny their obligation, merely because the signer intended the paper should be taken as his own, unless it was in fact taken on his private account, knowingly and intentionally on the part of the holders. But in this country the burden of proof is upon the plaintiff to show that the paper was given in the business and for the use of the firm; for it will be intended, *prima facie*, to have been given in the separate business of the partner signing it, and to be binding upon him alone;

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61; *Bawden v. Howell*, 3 Man. & G. 638; *Holmes v. Burton*, 9 Vt. 252; *Graeff v. Hitchman*, 5 Watts, 454; *Logan v. Bond*, 13 Ga. 192; *Hammond v. Aiken*, 3 Rich. Eq. 119. In *Haldeman v. Bank of Middletown*, 28 Penn. State, 440, a draft was drawn in the firm name by one of the partners, payable to his own order, and by him indorsed in his own name to one who supposed it was for the purposes of the firm. The partner applied the money to his private use. *Held*, that the firm was liable.

(g) *South Carolina Bank v. Case*, 8 B. & C. 427. In this case A, B, and C carried on business in copartnership as factors and commission-merchants in England and America; in England, under the firm of A, C, & Co.; in America, in the name of C alone. When C went to America he had written instructions from his partners, one of which was: "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." A, B, and C, in order to obtain consignments from America, made advances or granted drafts or bills of exchange, or indorsements of them, to their principals, on the security of the goods consigned. In order to obtain a consignment from W., C in his own name indorsed bills for him, which were to be provided for by others drawn by W. on A, C, & Co. in England, which were to be provided for by the proceeds of the consignment. Before the latter bills were presented for acceptance, A and B had become bankrupts. *Held*, that the indorsement of the bills by C must be considered as an indorsement by the firm, and that they were liable upon those bills. — But where A and B were partners in a trade carried on in the name of A only, and A drew bills in his own name payable to his order, which he indorsed, and afterwards B also indorsed and procured them to be discounted, it was *held*, that A and B were not liable upon the bills jointly, unless it appeared that A drew and indorsed the bills in the character of, and as representing, A and B. *Ex parte Bolitho*, Buck, 100.



at least if he is also engaged in business on his own separate account.(h)

If the note be signed actually for his private account, and the money be so applied, the partners are not liable, unless the holder can prove that he took the signature to be that of the partnership, and was justified in so regarding it by the acts or words of the partner making it, or by the other partners, or by the course of their business.(i) If a third person, believing such a note to be binding on the partners when it is not, sign or indorse it as surety, he will not be liable thereon to one who knew that it was valid only against one partner.(j)

If the partner obtained the money by representing the signature to be that of the firm, but misapplied the money, this may

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(h) Thus, in *Manufacturers', &c. Bank v. Winship*, 5 Pick. 11, it was *held*, that, where a partnership was carried on in the name of an individual, a note in common form, signed by such individual, did not *prima facie* bind his copartners; and that upon the question whether it was given for the use of the copartnership, the burden of proof was on the holder. So in *Mercantile Bank v. Cox*, 38 Maine, 500, it was *held*, that if A and B are doing business as partners under the name of A alone, and a bill of exchange is drawn upon A and accepted by him, it is *prima facie* binding upon A, and not upon the firm. So in *Boyle v. Skinner*, 19 Misso. 82, where a note was made payable to J. A. H., and there was a firm composed of J. A. H. and others, doing business under the style of J. A. H., but no evidence was offered to show to whom or on what account the note was given; it was *held*, that it should be presumed to have been given to J. A. H. individually. And see, to the same effect, *U. S. Bank v. Binney*, 5 Mason, 176; *Buckner v. Lee*, 8 Ga. 285; *Bank of Rochester v. Monteath*, 1 Denio, 402. In *Furze v. Sharwood*, 2 Q. B. 388, which was an action against several defendants as indorsers of bills of exchange, Lord *Denman* said: "The defendants appear to have been trustees under a deed, by the provisions of which they were to carry on a business in the name of Samuel Maine. They did so, and employed Samuel Maine himself to conduct the business. Their firm, therefore, so to speak, was Samuel Maine. The indorsement of bills was necessary and incidental to the carrying on such business. *Prima facie*, therefore, the signature 'Samuel Maine' was their signature, and they would be bound by it. But it is said that Maine carried on a separate business of his own, and that the plaintiff was bound to show that the indorsements in question were on account of the business of the trustees, and not in his separate business. Now it appears that the bills were discounted with persons who were in the habit of discounting for the former firm, who assigned their effects to the defendants as trustees; and, moreover, that the bills in question were not discounted till after Maine had ceased to carry on his separate business. Under these circumstances we think that the *onus* of showing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, lay on the defendants."

(i) *U. S. Bank v. Binney*, 5 Mason, 176; *Buckner v. Lee*, 8 Ga. 285; *Woodward v. Winship*, 12 Pick. 430.

(j) *Livingston v. Hastie*, 2 Caines, 246; *Chazournes v. Edwards*, 3 Pick. 5; *Williams v. Walbridge*, 3 Wend. 415.

be a fraud on the partners, but it will be a fraud which the partnership enabled him to commit, and the other partners will be liable, unless the holder had notice or knowledge, or sufficient means of knowledge, of the intended fraud.<sup>(k)</sup> If the other members knew that the transaction was done in the name of the firm, and do not dissent or object when they may, they will be liable on the note, although they did not know that the purchase was made on credit, and even if the purchase were not properly within the authority of the party making it.<sup>(l)</sup>

Partners, as between themselves, may enter into any lawful stipulations they like, and these are binding upon them; but the law interferes in respect to them, when the question is between the partners and a third party. The rule is this: If a partner, by agreement with his copartners, has no authority to sign for them at all, or none to sign for them in a particular case, and nevertheless does sign for them, this binds the partners as to all third parties who did not know of the agreement or want of authority.<sup>(m)</sup> But it is fraud on the part of that partner against the other partners; and one who takes papers so signed, with a knowledge of the agreement, has a knowledge of the fraud also, (for a mistake as to the law or the legal rights of the parties cannot help him,) and he is, therefore, a party or privy to the fraud, and cannot hold the other partners.

In general, as we have seen, however a partner may transcend his authority or violate his stipulations with his partners, this is no defence for them against an innocent party; and even securities which are void as against the firm in the hands of those who knew the fraud in which they originated, may be good in the hands of innocent holders for value. But, on the other hand, if a firm sues on a note or bill, a good defence against any one partner is a good defence against all; and this even if it rest on his fraud, of which they were not cognizant or participant. Thus, if one partner relieves an acceptor of his responsibility, this discharges him as to all, although it was a fraudulent act of the partner.<sup>(n)</sup> And this rule has been applied where A indorsed to

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(k) *U. S. Bank v. Binney*, 5 Mason, 176; *Buckner v. Lee*, 8 Ga. 285.

(l) *Woodward v. Winship*, 12 Pick. 430.

(m) *Kimbrow v. Bullitt*, 22 How. 256; *Winship v. Bank of United States*, 5 Pet. 529; *Miller v. Hughes*, 1 A. K. Marsh. 181; *Gallway v. Mathew*, 10 East, 264.

(n) Thus, in *Richmond v. Heapy*, 1 Stark. 202, one of three partners undertook to



a firm of A, B, & C, a bill drawn in his own name on D, and accepted. A had given D his promise in writing to provide for the bill, and it was held, in a suit by the firm against the drawee, that A's promise bound the other partners.<sup>(o)</sup> Perhaps, however, the other partners might have some relief in equity.<sup>(p)</sup>

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provide for two bills of exchange, drawn by the three partners, and accepted by a fourth person when they should become due. *Held*, that such acceptances would not support a commission of bankruptcy, on the petition of the three partners against the acceptor; although the conduct of the partner might, as against his copartners, have been fraudulent. Lord *Ellenborough* said: "Suppose that an action had been brought by the three partners on these bills, would it not have been an answer that one of the plaintiffs had promised to provide for the bills? Are they not bound by his acts when they are to recover by his strength?" The principle was carried very far in *Jacaud v. French*, 12 East, 317. Jacaud being partner with Blair in one mercantile house, and with Gordon in another, the house of Blair & Jacaud indorsed a bill of exchange to the house of Jacaud & Gordon; after which Blair, acting for the house of Blair & Jacaud, received securities to a large amount from the drawer of the bill, upon an agreement by Blair that the bill should be taken up and liquidated by his house, and, if not paid by the acceptors when due, should be returned to the drawer. *Held*, that, the securities being paid and the money received by Blair in satisfaction of the bill, Jacaud was bound by this act of his partner Blair, whether in fact known to him or not at the time, not only in respect of his partnership interest in the house of Jacaud & Blair, but also individually in other respects; and therefore that he together with Gordon, his partner in the other house, could not maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of, and by agreement with, Blair in discharge of the same. Lord *Ellenborough* said: "Jacaud, being a partner with Blair, must be considered as having, together with Blair, received money from the drawers to take up this very bill. How then can he, because he is also a partner with Gordon in another house, be permitted to contravene his own act, and sue upon this bill, which has been already satisfied as to him? If A and B, partners, receive money to apply to a particular purpose, A and C, in another partnership, could never be permitted to contravene the receipt of it for that purpose, and apply it to another." Bayley, J. said: "Jacaud is not to be considered as a *bona fide* holder of this bill, because he has in effect, by the act of his partner Blair, received money for the purpose of taking it up, which ought to have been so applied."

<sup>(o)</sup> *Sparrow v. Chisman*, 9 B. & C. 241.

<sup>(p)</sup> In *Jones v. Yates*, 9 B. & C. 532, which was an action of trover by the assignees of Sykes & Bury, to recover for three bills of exchange which had belonged to Sykes & Bury, and had been indorsed by Sykes, in fraud of the firm, for the payment of his private debt, Lord *Tenterden* said: "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that where one of two persons, who have a joint right of action, dies, the right then vests in the survivor, so that in this case (if it be held that Sykes & Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act by alleging his own misconduct. The defrauded partner may, perhaps, have a remedy in equity, by a suit in his own name, against his partner and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing on the ground of

In general, or at least frequently, a holder who takes security from one or more partners liable on negotiable paper discharges the rest. But it would seem that a holder who, in good faith, and by an express bargain, retains the original paper, and reserves his rights against all the partners, may revert to them if the security prove ineffectual.<sup>(q)</sup>

If a partner, intending to use the name of the firm, make a slight and unimportant variation in it, the firm is still bound; but not if the variation be material.<sup>(r)</sup> If a bill, however, be drawn upon a partnership, and accepted by one partner for partnership purposes, but in his own name, the acceptance binds the firm;<sup>(s)</sup> and even a bill drawn by one partner on his own firm, for a partnership debt, will be valid, and held as an accepted bill.<sup>(t)</sup>

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his own misconduct. There is a great difference between this case and that of an action brought against two or more partners on a bill of exchange fraudulently made or accepted by one partner in the name of the others, and delivered by such partner to a plaintiff in discharge of his own private debt. In the latter case, the defence is not the defence of the fraudulent party, but of the defrauded and injured party. The latter may, without any inconsistency, be permitted to say in a court of law, that although the partner may for many purposes bind him, yet that he has no authority to do so by accepting a bill in the name of the firm for his own private debt. 'The party to a fraud, he who profits by it, shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action at law'

<sup>(q)</sup> *Evans v. Drummond*, 4 Esp. 89; *Bedford v. Deakin*, 2 Stark. 178, 2 B. & Ald. 210; *Thompson v. Percival*, 5 B. & Ad. 925; *Estate of Davis & Desauque*, 5 Whart. 530; *Yarnell v. Anderson*, 14 Misso. 619; *Vernon v. Manhattan Co.*, 22 Wend. 183; *Parker v. Cousins*, 2 Grat. 372. But see *contra*, *Isler v. Baker*, 6 Humph. 85.

<sup>(r)</sup> *Williamson v. Johnson*, 1 B. & C. 146. In *Faith v. Richmond*, 11 A. & E. 339, it was *held*, that where a partner, accustomed to issue notes on behalf of the firm, indorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in an action brought upon it by the indorsee; the proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner. In that case a partner in "The Newcastle and Sunderland Wall's End Coal Company" drew a note in the name of "The Newcastle Coal Company," and made it payable at a bank where the first-mentioned company had no account. A verdict for the defendants was not disturbed. In *Kirk v. Blarton*, 9 M. & W. 284, it was *held*, that a partner has no implied authority by law to bind his copartners by his acceptance of a bill of exchange, except by an acceptance in the true style of the partnership. Therefore, where a firm consisted of J. B. and C. H., the partnership name being "J. B." only, and C. H. accepted a bill in the name of "J. B. & Co.," it was *held*, that J. B. was not bound thereby. See *MacLae v. Sutherland*, 3 Ellis & B. 31.

<sup>(s)</sup> *Mason v. Rumsey*, 1 Camp. 384; *Jenkins v. Morris*, 16 M. & W. 877. See *supra*, p. 123, note k.

<sup>(t)</sup> *Dougal v. Cowles*, 5 Day, 511.

One partner cannot bind his copartners by making, in their name, a joint and several note, without express authority.<sup>(u)</sup> But it has been held that such a note will be void only as a several note, and good as a joint note.<sup>(v)</sup> If he uses the actual names of all his partners on paper in partnership business, it would seem that this might hold them.<sup>(w)</sup> If A, B, and C are in partnership, and a note given by one of them is signed "A & Co.," this will be presumed, in the absence of evidence to the contrary, to be the partnership name.<sup>(x)</sup>

If a man is a partner in two firms, it is obvious that the one firm cannot sue the other, either on negotiable paper or on any contract, although his name appear but in one or in neither of the

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(u) *Perring v. Hone*, 4 Bing. 28, 2 C. & P. 401. In *Ex parte Wilson*, 3 Mont. D. & De G. 57, A and B, who were partners, and C, as their surety, gave a joint and several promissory note to D, by which they "jointly and severally" promised to pay to D the amount of a partnership debt, due from A and B. The note was signed by A and B, not as individuals, but in their partnership firm, and by C, the surety. Held, that this note could not be treated as the several note of each one of the three, but as the several note only of the surety, and the joint note of A and B; and that, on the bankruptcy of A, who had survived his partner B, the holder of the note could only rank as a creditor against the joint estate.

(v) *Maclae v Sutherland*, 3 Ellis & B 33. Lord Campbell said: "The expression in the note by which a separate liability is sought to be created may be easily detached in construing it, and taken *pro non scripta*; as against the shareholders it is utterly void, and it does them no injury. The perfect and complete contract of joint liability is not vitiated by the directors having, *ultra vires*, written upon the same piece of paper words which are wholly inoperative. If A and B are in partnership, and A, for a partnership debt *bona fide* gives a promissory note in the partnership firm, there seems considerable difficulty in contending that A and B may not be jointly sued upon it, because it professes to bind them separately as well as jointly. Why should the security perish instead of being available, when, as far as it is sought to be enforced, it might lawfully be created, and it expresses the intention of the parties? Surely this would be unjust, and contrary to well-known legal maxims."

(w) *Norton v. Seymour*, 3 C. B. 792. In this case, the firm was "Seymour & Ayres"; and the note was signed "Thomas Scymour, Sarah Ayres." Maule, J. said: "As to the form of the note, it is to be observed that it is signed by Seymour in the name of himself and the other member of the firm. Suppose there was no authority so to sign it, other than the general authority conferred by the partnership, I should hesitate to say that one of two partners could not bind the other by signing the true names of both, instead of the fictitious name." And see *McGregor v. Cleveland*, 5 Wend. 475.

(x) *Drake v. Elwyn*, 1 Caines, 184. The note in this case was signed "Elwyn & Co." Kent, J. said: "As such a signature imported a copartnership, and a copartnership did exist at the time between Elwyn and the other defendants, I think it is to be presumed that such was the name of the firm, and that it was sufficient to cast upon the defendants the burden of proving what was the name of the house or firm, if a different name existed. They did not attempt to repel the presumption, and of course it belonged to the jury to consider of, and to draw that presumption."

firms. For all the names must be truly set forth in the declaration, and the same party cannot be plaintiff and defendant.<sup>(y)</sup> But if one of these firms makes a note to the other, and the other indorses it over, the indorsee may hold either or both firms.<sup>(z)</sup> So the death of the partner would terminate all this difficulty.<sup>(a)</sup> And if a man be a partner in two firms, both of which use the same style, and he draw a bill or note in that style, it is said that the holder may elect which firm to sue.<sup>(b)</sup> But certainly the circumstances under which he took the paper, or the course of business, might confine him to one.

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<sup>(y)</sup> Thus, in *Mainwaring v. Newman*, 2 B. & P. 120, A made a note, payable to himself, and to B and C. This note was indorsed to C, D, and E. *Held*, that the indorsees could not maintain an action, either against all the indorsers jointly, or against one of them severally. Not against them all jointly, because then the same person would be both plaintiff and defendant; and not against one severally, because the contract was joint. So in *Neale v. Turton*, 4 Bing. 149, where the plaintiff, a holder of shares in a washing company, drew bills on the directors of the company for goods furnished by him; and the bills were accepted by the secretary of the company "for the directors"; it was *held*, that the plaintiff could not recover on these bills against the company. *Best*, C. J. said: "It may be admitted, that if a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such an acceptance a separate right is acknowledged to exist. But that is not the case here, for the bills are drawn on the directors of the company, and accepted for the directors. They are the agents of the company, and accept as agents of the company. The case, therefore, is that of one partner drawing on the whole firm, including himself. There is no principle by which a man can be at the same time plaintiff and defendant." And see *Teague v. Hubbard*, 8 B. & C. 345; *Fox v. Frith*, 10 M. & W. 131; *Lomas v. Bradshaw*, 9 C. B. 620; *Mahan v. Sherman*, 7 Blackf. 378; *Babcock v. Stone*, 3 McLean, 172.

<sup>(z)</sup> Thus, in *Pitcher v. Barrows*, 17 Pick. 361, which was an action by an indorsee of a promissory note, made by a firm consisting of five members, and payable to two of the same number, constituting a separate firm, *Shaw*, C. J. said: "Though no question was made at the argument as to the original form of this contract, it may be proper to make a remark upon that subject. It was a promise by five, to pay to two of their own number or their order, and as an original contract it could not be enforced at law, for the obvious reason that the two promiscs could not sue themselves as promisors, and the other three promisors were not liable without them. But this is a difficulty attending the remedy only, not the right, and when the note is indorsed, by those having a right to indorse it, to one against whom there is no such exception, whereby he acquires a legal interest and right to sue in his own name, the difficulty vanishes. It is like a note payable to one's own order, which, though till indorsement not a good legal contract, becomes such by the indorsement." And see, to the same effect, *Blake v. Wheadon*, 2 Hayw. 109; *Thayer v. Buffum*, 11 Met. 398; *Davis v. Briggs*, 39 Maine, 304; *Smith v. Lusher*, 5 Cowen, 688.

<sup>(a)</sup> *Byles on Bills*, 6th ed., p. 31.

<sup>(b)</sup> *Baker v. Charlton*, Peake, 80; *McNair v. Fleming*, 1 Mont. on Partn. 32, note 7. And see *Swan v. Steele*, 7 East, 210.

The general authority of one partner to bind the rest springs from the course and usage of business in which the firm is engaged. In trading partnerships, the power of one partner to bind the others by a bill or note given in the usual course of the business undoubtedly exists.<sup>(c)</sup> But it has been repeatedly held, that if the partnership be for a business not requiring the giving of notes, or if the note in question is clearly outside of the business of the partnership, the partners not signing are not bound. This rule applies to attorneys,<sup>(d)</sup> or partners in the practice of medicine,<sup>(e)</sup> or in keeping tavern,<sup>(f)</sup> or in farming,<sup>(g)</sup> or mining.<sup>(h)</sup> We should, however, have no doubt in any of these cases,

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(c) *Kimbrow v. Bullitt*, 22 How. 256.

(d) Thus, in *Hedley v. Bainbridge*, 3 Q. B. 316, which was an action against an attorney on a promissory note, given by his partner in the name of the firm, Lord Denman said: "No doubt a debt was due from the firm; but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business." *Levy v. Pyne*, Car. & M. 453, is to the same effect.

(e) In *Crosthwait v. Ross*, 1 Humph. 23, it was held, that a partner in the practice of physic has the power to bind his copartner by the execution of a note in the name of the firm for the purchase of all things necessary to be used by them in their vocation, such as medicines, surgical instruments, and the like; but has no power to draw bills or make notes for the purpose of raising money; money not being an article for which such a firm has a direct use.

(f) In *Cocke v. Branch Bank*, 3 Ala. 175, it was held, that one of a firm of tavern-keepers has no authority to bind his copartners by a note, the consideration of which has no connection with the business of the joint concern; and the want of such consideration may be shown in defence to an action by a *bona fide* holder of the note. And see *Williams v. Thomas*, 6 Esp. 18.

(g) See *Kimbrow v. Bullitt*, 22 How. 267; per *Littledale, J.* in *Dickinson v. Valpy*, 10 B. & C. 128. The case of *Greenslade v. Downer*, 7 B. & C. 635, which is usually cited in support of this proposition, was decided on another ground.

(h) *Dickinson v. Valpy*, 10 B. & C. 128. *Littledale, J.* said: "In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company) to bind the rest by drawing or accepting bills. One of several per-

if the concerns were of such magnitude as to require a large capital, and credit, that a note given by one member of the firm in the usual course of the business would bind the firm. This would depend very much, however, upon the usage either of the particular firm, or of other firms engaged in the like business.<sup>(i)</sup>

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sons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a salable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent on the plaintiff, in this case, to have shown, either from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual; for if it were necessary or usual, it would be reasonable that the directors should have such a power, and the law would imply it." *Parke, B.* said: "I very much doubt whether there is any authority in mining companies, arising by implication from the nature of their dealings, (and it is to be observed that there was no proof of any usage to do this in such companies,) to draw bills of exchange. The argument would go to this, that all persons who deal in the produce of the land which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of exchange for the purpose of receiving payment for it. If the argument was valid, it would show that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange upon the persons to whom the produce of the land was sold. There is, however, no necessity to decide that point, because there is no ground, at all events, to say that mining partners have an implied authority from one another, arising from the nature of their business, to draw such a bill of exchange as this; for, upon the face of it, this is a bill drawn by the company upon themselves, and though it is in form treated as a bill of exchange, it is in substance only a promissory note; and the effect of saying that one member of a company like this can draw such bills or promissory notes would be, that each of the partners in the concern would have the power of pledging the others, not only to the extent of the goods the company might sell in the course of their ordinary dealings, but without any limit at all, inasmuch as one partner might raise money to any amount by drawing bills of exchange, and, if they were passed into the hands of innocent indorsees, the partners would be liable to the full extent of their fortunes."

(i) In *Kimbrow v. Bullitt*, 22 How. 256, 268, a bill of exchange was drawn by one partner of a firm which was engaged in farming, in running a steam saw-mill, and in trading. The court, per *Clifford, J.*, were of the opinion that, if the firm had been engaged in farming, no power would have existed in one partner to bind the others by a bill or note, but that, as they were also engaged in trading, such power existed. In respect to the steam saw-mill, *Clifford, J.* said: "They were also engaged in running a steam saw-mill, for manufacturing purposes; and common observation will warrant the remark, that those who engage in that business always want capital to carry it on, and frequently find it necessary to ask for credit. Like those engaged in other branches of manufactures, they buy and sell, and have occasion to remit money and collect it from distant places." See however, *contra*, as to a steam saw-mill being within the rule,



Members of a joint-stock company have no power, as such, to draw bills or make notes in the name of the company.(j) And although there may be occasional or special partnerships, and within their limits the whole law of partnership applies, the mere joint promise of two to make a certain purchase and pay for it in good negotiable notes, to be indorsed by them, does not constitute them partners, or otherwise authorize one of them to indorse in the name of the other.(k)

Suretyship is not, in general, within the business of a partnership. And therefore, if to a bill or note already signed, a partner writes the name of his firm, with the word "surety" added, this does not bind his partners without their assent.(l) And if a partner sign the name of his firm, ostensibly as makers of a note, but in fact as sureties, and this is known to the payee, he cannot enforce the paper against them.(m) The same principle, of course, applies to all cases of making or indorsing bills or notes by one partner, on behalf of his firm, for the accommodation of third persons.(n) But it is otherwise where one partner, for the benefit of the firm, exchanges the acceptance of the firm for the acceptance of a third person; both acceptances being for the same amount. In that case the firm will be held.(o)

If it appears upon the face of a bill or note, that it was signed by a partnership as sureties merely, this will be notice to any one who may take it, that it was given out of the course of the partnership business. Therefore, no subsequent holder can recover on it, without proving the assent of all the partners to the signature. But if there is nothing on the face of the paper to indicate for what purpose it was given, any one who shall take it *bona fide*, without knowledge that it was given out

*Lanier v. McCabe*, 2 Fla. 32. On the question of usage see the case of *Dickinson v. Valpy*, 10 B. & C. 128.

(j) *Bramah v. Roberts*, 3 Bing. N. C. 963; *Bult v. Morrell*, 12 A. & E. 745; *Dickinson v. Valpy*, *supra*.

(k) *Ballou v. Spencer*, 4 Cowen, 163.

(l) *Foot v. Sabin*, 19 Johns. 154; *Boyd v. Plumb*, 7 Wend. 309; *Butler v. Stocking*, 4 Seld. 408; *Rollins v. Stevens*, 31 Maine, 454; *Andrews v. Planters' Bank*, 7 Smedes & M. 192; *Wagnon v. Clay*, 1 A. K. Marsh. 257.

(m) *Bank of Rochester v. Bowen*, 7 Wend. 158; *Rolston v. Click*, 1 Stew. 526.

(n) *Stall v. Catskill Bank*, 18 Wend. 466; *Beach v. State Bank*, 2 Ind. 488; *Chenoweth v. Chamberlin*, 6 B. Mon. 60; *Sweetser v. French*, 2 Cush. 309; *Laverty v. Burr*, 1 Wend. 529.

(o) *Gano v. Samuel*, 14 Ohio, 592. See *Darling v. March*, 22 Maine, 184

of the course of the partnership business, will be protected.(p)

It has been said, that if the maker of a note carries it to a bank to get it discounted on his own account, or transfers it to a third person, with the name of a firm indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the maker; and the bank or person who receives it from the maker being thus chargeable with notice that the firm are mere sureties of the maker, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm who have been made sureties without their consent are not liable to such holder of the note.(q)

Sometimes a partnership name is signed, in form, as surety for a third person, while really the undertaking is for their own debt, and the note is given for their own benefit. In such cases the substance of the transaction, and not the form, will be regarded. Thus, if a partner, acting for the firm, procures A. who is a debtor of the firm, to give his note for the amount of the debt to C, who is a creditor of the firm, and thereupon the partner adds the partnership name to the note, as surety, and C takes it in payment of his debt, the firm will be liable on the note.(r)

The giving of accommodation paper is considered as so far out of the line of regular commercial business, that, if such paper be made and given by one member of a firm, the other partners will not be holden to any party chargeable with notice or knowledge that it is accommodation paper, unless it was made with their consent.(s) But when a bill or note has been given in the partnership name, with the consent of all the partners, for the accommodation of a third person, it has been held that such bill or note may be renewed from time to time by a single partner.(t)

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(p) See cases *supra*.

(q) Per *Walworth, C.* in *Stall v. Catskill Bank*, 18 Wend. 478; *Bank of Vergennes v. Cameron*, 7 Barb. 143. See *Austin v. Vandermark*, 4 Hill, 259; *Gansevoort v. Williams*, 14 Wend. 133.

(r) *Langan v. Hewett*, 13 Smedes & M. 122.

(s) *Austin v. Vandermark*, 4 Hill, 259; *Stall v. Catskill Bank*, 18 Wend. 466; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Sweetser v. French*, 2 Cush. 309.

(t) *Dundass v. Gallagher*, 4 Penn. State, 205.



And previous dealings, or recognitions of previous notes or bills of like kind, or other similar circumstances, may indicate the consent of the other partners in the case of accommodation paper, or paper bearing their signature as sureties, in like manner as has been already stated in reference to the authority of agents.

It may be added, that subsequent recognition or ratification of negotiable paper, by partners, has the same effect as when this occurs in a case of agency. And a ratification need not be express; it may be inferred from the acts or omissions of the other partners, after they know, or have the means of knowing, of the acts of the individual partner.<sup>(u)</sup> So where it is necessary for the plaintiff to show the assent of the copartners to the giving of a bill or note, he need not show an *express* assent; it may be implied from circumstances, such as the common course of business of the firm, or the previous course of dealing between the parties.<sup>(v)</sup>

Partners are actual and ostensible; and this they may be, if well known, although their names be not used in the style of the firm; in which case they are liable both on the ground of the credit they give to the concern, and also of the profits which they take from it. Or they are secret, in which case they are liable on the ground of their participation in the profits; or nominal only, in which case they are liable because of the credit they give, by holding themselves out, or suffering themselves to be held out, as partners. But there is a material difference between these kinds of partners, in case of dissolution and notice. A secret partner is not liable for debts contracted after he leaves the partnership, although he gives no notice; for his taking of profits, which is the only ground of his liability, has ceased.<sup>(w)</sup> A nominal partner, whether actual or not, is liable, after leaving the firm, certainly to those who had formerly dealt with the firm, and have no notice or knowledge of his leaving the firm, and no such means of knowledge as binds them. And he may be bound even to

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<sup>(u)</sup> Sweetser v. French, 2 Cush. 309.

<sup>(v)</sup> Sweetser v. French, 2 Cush. 309; Beach v. State Bank, 2 Ind. 488; Butler v. Stocking, 4 Seld. 408; Duncan v. Lowndes, 3 Camp. 478; Gansevoort v. Williams 14 Wend. 133; Darling v. March, 22 Maine, 184.

<sup>(w)</sup> See 1 Parsons on Cont. 143, note *h*.

a new customer, who comes to the firm in the belief that he is a partner, and on his credit, with a sufficient reason for his belief.(x)

A new partner is not bound for old debts, unless he expressly assume them, or agree with the partners to be bound ; or unless this assumption or agreement may be inferred from his entering at once into the whole business, interest, and profits of the concern ; and such a course would generally imply that he takes all this benefit and property *cum onere*, and is therefore bound by the liabilities. But if in this way he is defrauded into a disastrous connection, this should not bind him towards creditors with whom there are no new dealings on his credit, and from whom there is no consideration moving to him.(y)

A creditor discharges the former partners and accepts instead the responsibility of a new firm, either expressly, or by continuing to deal with the new firm, after notice of the transfer of his account, without any objection, provided this be done or accompanied with such words or acts as indicate his purpose of discharging the former partners, but not otherwise.(z)

Notice of the dissolution of a firm, or of the retiring of a partner, should always be given in the usual way. This is personal notice by letter or otherwise to all who usually do business with the firm, and to all creditors of the firm, and public notice by advertisements. If this is done, the retiring partner is not responsible for the subsequent debts of the firm.(a) Nor is he responsible to any one who has actual notice of his retirement.(b) Death of a general, or even of a special partner, operates a dissolution of the firm, and as respects the estate of a deceased partner, no notice need be given. And it has recently been held that the surviving partners are not bound to give notice of that fact in order to terminate their liability for the acts of each other.(ba) In the case cited in our note, there was no evidence

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(x) 1 Parsons on Cont. 144, 145, and notes.

(y) 1 Parsons on Cont. 166, note i. See *Shirreff v. Wilks*, 1 East, 48 ; *Vere v. Ashby*, 10 B. & C. 288 ; *Battley v. Lewis*, 1 Man. & G. 155.

(z) *Kirwan v. Kirwan*, 2 Crompt. & M. 617.

(a) Parsons, Elements of Merc. Law, 2d ed., 172, and notes.

(b) Ibid.

(ba) *Marlett v. Jackman*, 3 Allen, 287.

that the surviving partners knew of the decease ; but the court said that, even if they had such knowledge, they would not be obliged to give notice.(c)

✓ On the dissolution of a firm by the death of one of the members, the survivors are joint tenants, and not tenants in common, so far that they take the property of the firm by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts are paid ; (d) but the harsh doctrine of the *jus accrescendi*, which is an incident of joint tenancy at common law, does not apply.(e) It is an unquestioned principle of law, that after a dissolution the authority of a former partner to bind the others is gone, except as to the settlement of the estate of the old partnership, and it is usually stated that he has no power to make any new contracts. It is obvious, however, that a strict construction of this rule might prevent the partner whose duty it is to settle up the estate from accomplishing this object in the most judicious manner. So far as the question is still an open one, we should consider the true rule to be, that no contract can be made by one partner after dissolution by which the others will be bound, unless such contract is an appropriate means for settling up the business of the concern in the most judicious manner. Their duty is similar in many respects to that of trustees and agents,(f) and they should, in settling up the affairs of the old firm, have all the rights which agents usually have by the usages of the business in which the old firm was engaged. In the language of the Supreme Court of Maine, "The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created."(g)

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(c) See Parsons, Elements of Merc. Law, 2d ed., 172, 192.

(d) Dyer v. Clark, 5 Met. 562 ; Murray v. Mumford, 6 Cowen, 441.

(e) Buckley v. Barber, 6 Exch. 164, 1 Eng. L. & Eq. 506.

(f) Washburn v. Goodman, 17 Pick. 519. And in Parker v. Phillips, 2 Cush. 175, 178, the court said : " Though a partnership is dissolved, and the mutual authority of the partners to bind each other, as to future transactions, has ceased, yet to some extent, and for some purposes, in regard to past transactions the partnership still exists." See also Caldwell v. Stileman, 1 Rawle, 212 ; Beak v. Beak, 3 Swanst. 627.

(g) Darling v. March, 22 Maine, 184. See also Gannett v. Cunningham, 34 Maine, 56.

Thus, in a case where a bill of exchange was drawn in blank by one partner, to the order of the firm, and indorsed before the dissolution of the firm, it was held that it might after that event be filled up and negotiated.<sup>(h)</sup> And after dissolution one partner may waive demand and notice, this being considered as merely a modification of an existing liability; <sup>(i)</sup> he may also, it has been held, lawfully assign to a creditor of the firm a demand due to the partnership; <sup>(j)</sup> or acknowledge in the partnership name, after dissolution, a balance due from the partnership.<sup>(k)</sup> If a note is signed by a firm payable to the order of one of its members, this person may indorse the note after the dissolution of the firm so as to bind it.<sup>(l)</sup>

In Pennsylvania the courts have fully adopted the principle, that as to past transactions the partnership continues until they are settled. Thus it is held that after dissolution a partner may borrow money to pay partnership debts,<sup>(m)</sup> and may renew the notes of the firm; <sup>(n)</sup> or give notes in the firm name in payment of firm debts.<sup>(o)</sup>

There are, however, other authorities, which construe the rule that a partner cannot make a new contract after dissolution very strictly, and hold that the power of a surviving partner not only does not extend to the giving of a note,<sup>(p)</sup> or

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<sup>(h)</sup> *Usher v. Dauncey*, 4 Camp. 97. In *Lewis v. Reilly*, 1 Q. B. 349, to an action by an indorsee on a bill drawn by defendants A and B, as partners, payable to their own order, and also indorsed by them, defendant B pleaded that the bill was indorsed by A to plaintiff, in the partnership name, after a dissolution of the partnership, without the privity or consent and in fraud of defendant B, and for A's private purposes; and that plaintiff knew of the dissolution at the time of the indorsement. *Held*, after verdict for defendant, that the plea was bad for not showing that plaintiff had colluded with A, or was privy to the fraud. Lord *Denman* said: "It is, perhaps, doing no violence to language to say that the partnership could not be dissolved as to this bill, so as to prevent it from being indorsed by either defendant in the name of the firm."

<sup>(i)</sup> *Darling v. March*, 22 Maine, 184.

<sup>(j)</sup> *Milliken v. Loring*, 37 Maine, 408.

<sup>(k)</sup> *Ide v. Ingraham*, 5 Gray, 106.

<sup>(l)</sup> *Temple v. Seaver*, 11 Cush. 314.

<sup>(m)</sup> *Estate of Davis & Desauque*, 5 Whart. 530.

<sup>(n)</sup> *Ibid.*; *Brown v. Clark*, 14 Penn. State, 469.

<sup>(o)</sup> *Robinson v. Taylor*, 4 Barr, 242.

<sup>(p)</sup> *Lockwood v. Comstock*, 4 McLean, 383; *Bank of Port Gibson v. Baugh*, 9 Smedes & M. 290; *Hamilton v. Seaman*, 1 Ind. 185; *Perrin v. Keene*, 19 Maine, 355; *Lusk v. Smith*, 8 Barb. 570. In *Mitchell v. Ostrom*, 2 Hill, 520, the note in suit was signed, "Late firm M., J., E., & Co."

accepting of a bill, *(q)* in the firm name, after dissolution, for a pre-existing debt of the firm, even though it be antedated so as to bear date before the dissolution, *(r)* but also that he cannot renew bills or notes given by the partnership before dissolution, so as to bind his former copartners, *(s)* or indorse notes given to the firm before dissolution, so as to vest the title in the indorsee. *(t)*

Nor, it has been held, can he indorse notes belonging to the firm at the time of the dissolution, so as either to render the other partners liable on his indorsment, or to pass a valid title to the notes. *(u)* It has even been doubted whether a note indorsed before dissolution, but negotiated afterwards, will bind the firm; *(v)* but if negotiated in good faith for the purposes for which it was indorsed, we are inclined to think it would, although the contrary doctrine has been held. *(w)*

One partner, after dissolution, may, of course, bind his copartner by any of the above acts, if he have an express authority for that purpose. And such authority may be given by parol, although the terms upon which the partnership was dissolved should be in writing. Thus, where a retired partner stated that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name, it was held that the jury were justified in finding that the continuing partner had authority to indorse promissory notes so left in his hands, in

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*(q)* Tombeckbee Bank v. Dumell, 5 Mason, 56.

*(r)* Wrightson v. Pullan, 1 Stark. 375; Lansing v. Gaine, 2 Johns. 300.

*(s)* Palmer v. Dodge, 4 Ohio State, 21; National Bank v. Norton, 1 Hill, 572; Parker v. Cousins, 2 Grat. 372; Martin v. Kirk, 2 Humph. 529; Long v. Story, 10 Misso. 636; Stone v. Chamberlin, 20 Ga. 259. In Bank of South Carolina v. Humphreys, 1 McCord, 388, the firm, during the continuance of the partnership, had written a letter to the holder of a note against them, requesting permission to renew it, until the expiration of a certain time, during which time a renewal was given by one partner, but subsequent to the dissolution. *Held*, that the firm was not bound.

*(t)* Sanford v. Mickles, 4 Johns. 224. See also Geortner v. Trustees, &c., 2 Barb. 625.

*(u)* Abel v. Sutton, 3 Esp. 108; Sanford v. Mickles, 4 Johns. 224; Parker v. Macomber, 18 Pick. 505; Humphries v. Chastain, 5 Ga. 166.

*(v)* Per Lord *Kenyon* in Abel v. Sutton, *supra*.

*(w)* In Glasscock v. Smith, 25 Ala. 474. The question was raised, but not decided, in Mechanics' Bank v. Hildreth, 9 Cush. 359.

the partnership name.(x) So an authority by parol to continuing partners to *sell* a negotiable note made to the firm before dissolution, will authorize an *indorsement* of such note, "without recourse," in the name of the firm.(y) It seems however, to be well settled, that an authority given to one partner "to close all business transactions of the late firm"; (z) "to settle up the business of the firm;" (a) "to settle all demands in favor of or against the firm"; (b) "to settle business of the firm, and for that purpose to use their name"; (c) "to settle business of the firm and sign its name for that purpose"; (d) "to use the name of the firm in liquidation, only, of past business"; (e) confers no more power than the partner would have by the general principles of the law of partnership. In one case, however, the court were of the opinion that the authority given to use the partnership name conferred a greater power than would have otherwise existed, and held that it was for the jury to find, from the course of trade, and the usage and custom of merchants, as well as from the notice itself, whether this power extended to the renewal of a note which had been discounted at a bank previous to the dissolution.(f) And if a partner, under such an authority, receives a note, in payment of a debt due to the firm, payable to bearer, it seems that the legal title to such note will vest in such partner alone; and, therefore, he will be able to give a good title to it by delivery.(g)

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(x) *Smith v. Winter*, 4 M. & W. 454. In *Burton v. Issitt*, 5 B. & Ald. 267, by a deed of dissolution of partnership, a power was reserved to the remaining partners to use the name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners before the dissolution, it was *held*, that the remaining partners had authority under that power to give to the defendant a note for the payment of the sixpences, under the Lords' Act, on behalf of themselves and the retiring partner.

(y) *Yale v. Eames*, 1 Met. 486.

(z) *Palmer v. Dodge*, 4 Ohio State, 21.

(a) *Parker v. Cousins*, 2 Grat. 372; *Long v. Story*, 10 Misso. 636; *Martin v. Walton*, 1 McCord, 16; *Parker v. Macomber*, 18 Pick. 505.

(b) *Lockwood v. Comstock*, 4 McLean, 383.

(c) *National Bank v. Norton*, 1 Hill, 572.

(d) *Hamilton v. Scaman*, 1 Ind. 185.

(e) *Martin v. Kirk*, 2 Humph. 529.

(f) *Myers v. Huggins*, 1 Strob. 473.

(g) In *Parker v. Macomber*, 18 Pick. 505, where the individual note of a partner, made after the dissolution of the partnership, was transferred by the holder to the firm,

As to any persons who have not been properly notified of the dissolution, the partners will be bound by the acts of a copartner, the same as before dissolution.<sup>(h)</sup> But in one case it was held that an attorney who knew that a dissolution was intended and agreed on, but did not know that it had taken place, as was in fact the case, could not hold the firm on an acceptance made by a partner in the name of the firm after the dissolution.<sup>(i)</sup>

Ratification and confirmation will have the same effect after a dissolution, as if the partners who adopt the signature and confirm it were still partners.<sup>(j)</sup>

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by an indorsement in blank, in payment of a debt, it was *held*, that such note, being payable to bearer, might be legally transferred to a third person by another partner, who was authorized to settle the concerns of the partnership. *Shaw, C. J.* said : " It is contended that, by this indorsement, delivery, and payment, the property in the note vested in all the members of the late firm, and though it was under a blank indorsement, it could not be passed by delivery, so as to vest a valid title in the holder, without the act of all the partners. But we are of opinion that this defence cannot be maintained. Being under a blank indorsement and passing by delivery, the title vested in any person or persons legally becoming the holders for value. Now we think the authority given to the two partners, the Howlands, to collect the debts and settle the affairs of the late firm, gave them authority to receive negotiable notes and drafts, as a means of obtaining payments. If so, they must be deemed to have received this note, as agents to settle ; they received it in their own right, and the property vested in them. This being the case, as they would take merchandise, bank-stock, or other articles affording the means of raising money and getting in the debts, they had a right to dispose of the property for the same purpose ; and it being a mercantile agency, each had the requisite authority. As they took the note under a blank indorsement, and it was in a condition to pass by a mere delivery, no indorsement of the firm was necessary ; and the want of authority, arising from a want of legal power to make such indorsement, applicable to the case of the other note, does not apply to this. If it be said that they, being agents, took this note for the use and benefit of all the members of the late firm, and so the title vested in them, we think it is necessary to distinguish between the legal and the beneficial interest. Undoubtedly the beneficial interest was in the members of the late firm ; and the agents were bound to render an account of the property and apply the proceeds to their benefit. But this is quite consistent with their taking a legal interest themselves in the security, in the same manner as if they had taken goods, bank-notes, or other property, to be turned into money and accounted for, pursuant to the trust and authority reposed in them for that purpose."

(*h*) *Whitman v. Leonard*, 3 Pick. 177 ; *Tombeckbee Bank v. Dumell*, 5 Mass. 56 ; *Lansing v. Gaine*, 2 Johns. 300 ; *Bristol v. Sprague*, 8 Wend. 423.

(*i*) *Paterson v. Zachariah*, 1 Stark. 71.

(*j*) *Waite v. Foster*, 33 Maine, 424 ; *Leonard v. Wildes*, 36 Maine, 265 ; *Lusk v. Smith*, 8 Barb. 570 ; *Chase v. Kendall*, 6 Ind. 304 ; *Eaton v. Taylor*, 10 Mass. 54.



## SECTION VI.

## OF LUNATICS.

IF these are under guardianship, they come under the statutory disability.<sup>(k)</sup> If not, their natural disability applies. But to such a case, somewhat of the same principle which governs as to the incapacity of infants also applies. If this natural incapacity is not in fact perfect, and if an insane or an imbecile person, while temporarily, or apparently, sane enough to transact ordinary business, gives his note for necessities, and it is received in good faith, it would seem to be proper, for the sake of the lunatic himself, that the note should be valid. Or if the note were set aside, because it fixed a certain price or amount which ought to be left open to inquiry, still his liability on the contract should be established, and the note might be evidence, of more or less value, of the quantum which should be paid.<sup>(l)</sup>

It is undoubtedly now true, that a man may "stultify himself," or prove in defence against a claim on any contract his insanity, or imbecility, or aberration, or defect of understanding from any cause, existing at the time the contract was made.<sup>(m)</sup> The general reason for this is, that there can be no contract unless there be a meeting of minds; and there can be no meeting of minds if the one party has no mind which can meet the mind of the other. Possibly this defence, to be effectual, must go far enough to show that this defect of mind was known to the other contracting party, or was unknown to him by reason of his own fault and negligence. It has been so held in cases of executed

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<sup>(k)</sup> *Leonard v. Leonard*, 14 Pick. 280.

<sup>(l)</sup> See *Gore v. Gibson*, 13 M. & W. 623. In *Bagster v. Earl of Portsmouth*, 7 Dowl. & R. 614, 2 C. & P. 178, it was *held*, that a lunatic is capable of contracting for necessities. Therefore, where a person of rank ordered carriages suitable to his condition, and the coachmaker supplied them *bona fide* and without fraud, and they were actually used by the party: *held*, that an action would lie upon the contract, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the carriages were ordered. *La Rue v. Gilkyson*, 4 Penn. State, 375, is to the same effect. And see *Richardson v. Strong*, 13 Ired. 106.

<sup>(m)</sup> *Mitchell v. Kingman*, 5 Pick. 431; *Gore v. Gibson*, 13 M. & W. 623; *Alcock v. Alcock*, 3 Man. & G. 268. See *contra*, *Brown v. Jodrell*, 3 C. & P. 30.



contracts.(n) But it may, we think, be well doubted whether any instrument or contract could be enforced in law, if one of the parties was distinctly *non compos mentis* when it was made.(o) It has been said that the note of one known to the payee to be insane is absolutely void, even in the hands of an innocent indorsee; (p) but such indorsee must certainly have his remedy against the indorser, either on the note or independently.

Sanity is to be presumed; the burden of proof being on him who denies it.(q) But to defeat a promissory note, it is only necessary to prove a condition of mind which makes self-protection against imposition impossible.(r)

An inquisition of lunacy is conclusive against those who are parties to it. But it is said that it may be rebutted by clear evi-

(n) Thus, in *Brown v. Jodrell*, 3 C. & P. 30, Moody & M. 105, which was an action for work and labor, and goods sold and delivered, it was *held* to be no defence, that the defendant was of unsound mind, unless the plaintiff knew of, or in some way took advantage of his incapacity, in order to impose on him. So in *Beals v. See*, 10 Penn. State, 56, it was *held*, that an executed contract by a merchant for the purchase of goods cannot be avoided by proof of insanity at the time of the purchase, unless there has been a fraud committed on him by the vendor, or he has knowledge of his condition. And in *Molton v. Camroux*, 4 Exch. 17, it was *held*, that unsoundness of mind will not vacate a contract, if it be unknown to the other contracting party, and no advantage be taken of the lunatic, especially where the contract is executed in whole or in part, so that the parties cannot be restored to their original position. Therefore, where a lunatic purchased certain annuities for his life, of a society which at the time had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of human affairs, and fair and *bona fide* on the part of the society, it was *held*, in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer,) that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

(o) In *Seaver v. Phelps*, 11 Pick. 304, in trover for a promissory note, pledged to the defendant by the plaintiff when the latter was insane, it was *held* not to be a legal defence that the defendant, at the time when he took the pledge, was not apprised of the plaintiff's being insane, and had no reason to suspect it, and did not overreach him nor practise any fraud or unfairness. And *Wilde, J.* said: "The defendant's counsel rely principally on a distinction between contracts executed, and those which are executory. But if this distinction were material, we do not perceive how it is made to appear that the contract of bailment is an executed contract, for if the note was pledged to secure the performance of an executory contract, and was part of the same transaction, it would rather be considered an executory contract. But we do not consider the distinction at all material. It is well settled that the conveyances of a *non compos* are voidable, and may be avoided by the writ *dum fuit non compos mentis*, or by entry."

(p) *Sentance v. Poole*, 3 C. & P. 1.

(q) *Jackson v. Van Dusen*, 5 Johns. 144; *Jackson v. King*, 4 Cowen, 207.

(r) *Johnson v. Chadwell*, 8 Humph. 145

dence of sanity, by other parties.(s) Before office found, the acts of a lunatic are said to be voidable only; (t) afterwards, void.(u) But we should have some doubt whether this distinction would be enforced so far as to say that the contract of a lunatic could not be ratified and confirmed by him after his sanity was restored.

It is quite well settled that the maker of a promissory note, sued by an indorsee, will be allowed to plead that the indorser was a lunatic at the time of the indorsement.(v)

Drunkenness is a species of insanity; but the law is not quite clear respecting this disability. Perhaps it stands thus: One cannot defend by proving his drunkenness, unless he can show that the drunkenness was known to the payee and taken advantage of by him; or that it was complete, and suspended all use of the mind at the time.(w) It might be doubted, however, whether such absolute drunkenness as this would be compatible with the physical ability of writing one's name. At all events, it must be law that no one can avail himself of drunkenness purposely caused by himself, with the intention of rendering contracts void which he should enter into in that state.

## SECTION VII.

### ALIENS.

THERE is nothing to prevent an alien, merely as such, from becoming a party to a promissory note or bill, and nothing

(s) *Den v. Clark*, 5 Halst. 217; *Rogers v. Walker*, 6 Penn. State, 371. But see, *contra*, *Leonard v. Leonard*, 14 Pick. 280; *Wadsworth v. Sharpsteen*, 4 Seld. 388.

(t) *Jackson v. Gumaer*, 2 Cowen, 552.

(u) *Pearl v. M'Dowell*, 3 J. J. Marsh. 658.

(v) *Alcock v. Alcock*, 3 Man. & G. 268; *Peaslee v. Robbins*, 3 Met. 164; *Burke v. Allen*, 9 Fost. 106.

(w) In *Pitt v. Smith*, 3 Camp. 33, it was *held*, that an agreement signed by a person in a state of complete intoxication was void. In *Gore v. Gibson*, 13 M. & W. 623, to an action by indorsee against indorser of a bill of exchange, the defendant pleaded, that when he indorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, nature, or effect of the indorsement, or to contract thereby; of which the plaintiff, at the time of the indorsement, had notice. *Held* to be a good answer to the action. And see *Jenners v. Howard*, 6 Blackf. 240; *Berkley v. Cannon*, 4 Rich. 136

in his alienage to affect his rights or obligations. If, however, he is an alien enemy, no contract entered into with him can be enforced in the courts of this country. He has no standing there to maintain his rights; and a citizen who enters into a contract with an enemy would be regarded as violating the law, and could not have its aid in carrying the contract into effect.(x)

This has been carried so far in England, that a bill drawn by an alien enemy on an English subject, then in England, and indorsed to an English subject abroad, was not permitted to be enforced in the English courts even after the restoration of peace.(y) The same principle would avoid all contracts for the purpose of remitting funds to an enemy's country, by bill or otherwise.(z) The only exceptions to this rule would seem to be in the case of bills or notes for ransom of property or persons;(a) or for obtaining necessities while a prisoner;(b) or for purposes connected with a voyage by cartel or license, in which cases there seems to be a kind of partial peace, or at least a suspension of the incidents of war.(c) Nor does it seem to be a sufficient objection to an action on a bill so protected, that it is brought, in part, in trust for an alien enemy.(d)

(x) *Griswold v. Waddington*, 16 Johns. 438.

(y) *Willison v. Patteson*, 7 Taunt. 439.

(z) *Griswold v. Waddington*, 16 Johns. 438; *Hoare v. Allen*, 2 Dallas, 102. But in *United States v. Barker*, 1 Paine, 156, it was *held*, that a citizen of the United States might lawfully, during a war with a foreign country, draw a bill on one of its subjects; such an act not leading to any injurious intercourse, nor amounting to a trading with the enemy.

(a) *Ricord v. Bettenham*, 3 Burr. 1734; *Cornu v. Blackburne*, 2 Doug. 641; *Anthony v. Fisher*, 2 Doug. 649, note; 3 *id.* 166.

(b) *Antoine v. Morshead*, 6 Taunt. 237. But see *Duhammel v. Pickering*, 2 Stark. 90.

(c) Thus, in *Suckley v. Furze*, 15 Johns. 338, where a bill of exchange was drawn in this country, upon a person in Great Britain, during the late war with that country, for supplies furnished by the payee to a British vessel authorized by act of Congress to sail from this country to an enemy's port, which was sold by the payee to the plaintiff, who remitted it to Great Britain for collection; it was *held*, that the remittance of the bill was within the protection afforded to the original transaction, and was not illegal.

(d) *Daubuz v. Morshead*, 6 Taunt. 332.

## SECTION VIII.

## BANKRUPTS.

WE have, in this country, no general bankrupt law; and the insolvent laws of the several States usually provide for most of the questions which can occur in relation to negotiable paper. In general, however, it may be said that all the property, chattels, or choses in action, and all the interest in any property belonging to the bankrupt, passes to his assignees. He has, therefore, no property left, and no power of disposition or control. He cannot sue, or indorse,<sup>(e)</sup> or assign. In respect to a bill or note received by a bankrupt after his bankruptcy, it is held, in England, that it does not vest absolutely in the assignees, although they have a right to claim it; but, in the absence of any claim by them, the title of the bankrupt is good as against all other persons.<sup>(f)</sup> And if the property in the

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(e) In *Ashurst v. Royal Bank of Australia*, Q. B. 1856, 37 Eng. L. & Eq. 195, it was *held* that a bankrupt could convey no title to a note by indorsing it after maturity, but it was said that he could before. See also *Smith v. De Witts*, 6 Dowl. & R. 120.

(f) *Kitchen v. Bartsch*, 7 East, 53. In this case it was *held* to be a good plea to an action on a promissory note, and for money lent, that the plaintiff was an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff; and it is not a good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in those behalves, and that the commissioners had made no new assignment of the said notes and money; for the general assignment of the commissioners passes to the assignees of the bankrupt all his after acquired as well as present personal property and debts. In *Drayton v. Dale*, 2 B & C. 293, which was *assumpsit* by the indorsee against the maker of a promissory note payable to A or his order, the defendant pleaded that A became bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to indorse the promissory note before the time of indorsement became vested in the assignees, whereby the indorsement by A was void, and created no rights in the plaintiffs to sue. Replication, that the indorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the defendant on this issue, it was *held*, that the plaintiff was entitled to judgment, *non obstante veredicto*. First, because the defendant, who had made the note payable to A or his order, was estopped from saying that A was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons.

bill had already passed from the bankrupt before his bankruptcy, or was so intended, and indorsement ought to be made, the bankrupt may indorse it, or the assignees may be compelled to indorse.(g)

## SECTION IX.

### OF EXECUTORS AND ADMINISTRATORS.

IN general they have all the rights and remedies of the deceased, although not named in the contracts or instruments from which these rights arise ; and lie under all the obligations of the deceased, so far as his assets suffice. All, however, with the important exception of those contracts, whether express or implied, which are so entirely personal to the deceased, that no one can fill his place or become his substitute ; so that all the rights and obligations arising under such contracts of course die with him.

If a negotiable note is indorsed, or if a non-negotiable note is assigned for value, to a dead man, whose death is not known, it becomes the property of his executor or administrator, in the same manner as if he had died after the transfer.(h) And this would probably be the case, if this transfer were made in good faith with a knowledge of the death ; as it could be made with no other intention than to place the note among his assets.

Only the executors or administrators, and not the heirs or next of kin of persons deceased, can claim possession of his bills and notes, or demand payment, or put them in suit.(i) In suing upon them, they must set out distinctly the facts which constitute their representative character, because this is a part of their title. It has been held not sufficient to describe themselves as executors, nor even to aver that they were duly appointed ; but they are required to set out the proceedings, so that the court may see that the appointment was legal.(j)

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(g) *Smith v. Pickering*, Peake, 50 ; *Ex parte Mowbray*, 1 Jac. & W. 428.

(h) *Murray v. East India Co.*, 5 B. & Ald. 204.

(i) *Morse v. Clayton*, 13 Smedes & M. 373.

(j) *Beach v. King*, 17 Wend. 197.

It is otherwise, if they receive a note payable to themselves, though for a debt due to the estate, and though payable to them *as executors*. For in such case their representative character constitutes no part of their title. The note never belonged to their testator, but vested in them originally. And if a bill or note, belonging to the testator at the time of his decease, is payable to bearer, they need not in suing upon it make title through him; they may sue as bearers simply. The same distinction is applicable to guardians, receivers, assignees in bankruptcy, and trustees of every description. *(k)*

It has been a vexed question, whether a note payable to "A, *as executor*," and given for a debt due to the estate, will be regarded as assets. It was once held that it would not; and therefore that a count upon such a note could not be joined with counts upon promises made to the testator in his lifetime. *(l)* But this doctrine has since been overruled; and it is now well settled that such a note will be assets, at least at the election of the executor. *(m)* Therefore, if he declares upon it as a note payable to him *as executor*, and lays the promise as made to him in his representative capacity, he may join counts upon promises to his testator in his lifetime. *(n)*

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*(k)* Gillet v. Fairchild, 4 Denio, 80; White v. Joy, 3 Kern. 83.

*(l)* Betts v. Mitchell, 10 Mod. 316. And see, per Chambre, J., in Hosier v. Arundell, 3 B. & P. 11.

*(m)* See Henshall v. Roberts, 5 East, 150; Hemphill v. Hamilton, 6 Eng. 425; Baker v. Baker, 4 Bibb, 346.

*(n)* King v. Thom, 1 T. R. 487. In Partridge v. Court, 5 Price, 412, affirmed on error in 7 Price, 591, it was *held*, that counts on promises made to an intestate may be joined in a declaration by an administrator, in an action of assumpsit on such promises, with counts on promissory notes given to the administrator since the death of the intestate as administrator, because the amount when recovered will be assets in the hands of the administrator. Graham, B. said: "Wherever the money when recovered shall be assets, counts in each character may be joined; and that is a fair and sound criterion, and one which is sufficient to prevent all ambiguity and doubt; it ought, therefore, to be adopted as a never-failing rule. Then we should look to this record with a view to see whether the money which is sought to be recovered would be assets in the hands of the administratrix, and in my opinion the judgment for the plaintiff would be conclusive, if produced, to show that assets had come to her hands, and might be used for that purpose." Wood, B.: "The objection to this declaration is, that it contains several counts which are distinct, and cannot be joined, some being framed on demands in the plaintiff's representative character, and others on demands which should be asserted by her personally, and no doubt if that were so, the declaration would be bad; but I am of opinion that all these counts are on demands arising to her in her representative

Upon the same principle, if an administrator, who has received such a note, dies before it is paid, it goes properly with the other assets into the hands of the administrator *de bonis non*, and he may sue upon it, and demand and receive payment.<sup>(o)</sup>

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character, and not in person. The true criterion of that is certainly what has been already stated, that where the money, if recovered, would be assets, the causes of action may be joined, and in this case I take it that the money, when recovered, may be clearly so considered. . . . The note is given to the administratrix, as administratrix, and that is not merely, as has been argued, a description of the person, it is a description of character, and of the character in which the debt is to be paid to her." See *Henshall v. Roberts*, 5 East, 150 ; per *Parke, B.*, in *Fyath v. Chilton*, 12 M. & W. 637 ; per *Nelson, C. J.*, in *Bogert v. Hertell*, 4 Hill, 503, *et seq.* In 1 Williams on Executors, 4th ed., 751, after stating the cases, it is said : " The principle on which these cases were decided has not been settled without conflict. Several old cases may be found, in which it was considered that the contracts made with an executor or administrator were personal to him, and that he must sue for them in his own right, and not in his representative capacity ; and particularly in the instance of negotiable instruments, it was conceived, until very modern times, that if an executor took a bill or note from a debtor to the estate of his testator, a new debt was thereby created, which must be declared on as such. However, the rule may now be regarded as firmly established by the more recent cases, that wherever the money recovered will be assets, the executor may sue for it and declare in his representative character." And see *Sheets v. Pabody*, 6 Blackf. 120. But see *Turnbull v. Freret*, 17 Mart. La. 703 ; *Gilman v. Horseley*, 17 Mart. La. 661 ; *Urquhart v. Taylor*, 5 Mart. La. 200 ; *Clampitt v. Newport*, 8 La. Ann. 124.

(o) Thus, in *Catherwood v. Chabaud*, 1 B. & C. 150, where a bill of exchange was indorsed generally, but delivered to S. C., as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid, it was *held*, that the administrators *de bonis non* of J. C. might sue upon the bill. *Abbott, C. J.* said : " It was clearly established by the evidence that the bill in question was given to S. C., as the administratrix of J. C., for money due to her intestate ; she took it as assets, and if she had received the money, that must undoubtedly have been accounted for to his estate. The money not having been received in her lifetime, the bill remained as a part of J. C.'s estate, and the right to it devolved upon the persons who afterwards became his representatives. This case differs widely from *Barker v. Talcot*, 1 Vern. 473, for there the debtor had actually paid the executor of the administrator ; now such a payment would, in equity, and might, perhaps, in law also, be a sufficient answer to any action afterwards brought to enforce payment of the same debt over again. Here no payment has been made by the debtor, who therefore cannot be damaged by this action. It has been decided in a variety of modern cases, that an administrator may sue as such upon a promise made to him in his representative character ; and that principle governs my opinion upon the present case ; for where the cause of action is such that the first administrator may sue in his representative character, the right of action devolves upon the administrator *de bonis non* of the intestate." *Bayley, J.* : " It was decided in the case of *King v. Thom*, 1 T. R. 487, that if a bill be indorsed to A and B as executors, they may declare as such in an action against the acceptor. In *Cowell v. Watts*, 6 East, 405, it was *held*, that an administrator may sue in his representative character upon promises made to himself, where the money will be assets when recovered. Now, if the administrator dies intestate, without having sued upon such a promise, the administrator *de bonis non* may sustain an action upon it ; for he



But payment to the administrator of the deceased has been held, in the English Court of Chancery, to discharge the payer; (*p*) and in a recent case this decision is so commented upon as to imply that the payment might be held good at law. (*q*) It is also intimated, in the same case, that there may be cases where the representative of the administrator might and ought to sue; as if the administrator had made himself debtor to the intestate's estate for the amount of the note. (*r*)

An executor or administrator may indorse a negotiable note of the deceased; and his assignment of a non-negotiable instrument passes the property to the assignee. (*s*) But such

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succeeds to all the legal rights which belonged to the administrator in his representative capacity. Here, S. C., the administratrix of J. C., might have sued as such upon the bill in question. This action was, therefore, properly brought by the administrators *de bonis non*. By this mode of proceeding, the money recovered is immediately applicable to the right fund, as assets of the first intestate; whereas, if the action had been brought by the personal representative of the administratrix of J. C., it would, in the first instance, have become a part of her estate, and must afterwards have been transferred from that to the estate of J. C., the first intestate." *Holroyd, J.*: "I am of the same opinion. The decisions in the old cases proceeded upon the principle that contracts made with an administrator were personal to him, and that he must sue upon them in his own right, and not in his representative capacity. That principle has since been altered, and it has been ruled in several modern cases, that upon such contracts an administrator may sue in his representative character. The older cases have, therefore, received a qualification, and are not now to be considered as law to their full extent." *Best, J.*: "In refusing this rule it is not necessary to decide that the administrator of the administratrix S. C. could not have sued; it is sufficient to say, that the administrator *de bonis non* might sue; and this observation may serve to reconcile the various cases which have been referred to. An action by the administrator *de bonis non* was certainly the most proper, that being the shortest and most convenient mode of bringing the money recovered into the funds of the original intestate." *Abbott, C. J.*: "There is much weight in the distinction which has been taken by my brother *Best*. There may be cases where the administrator of an administrator might and ought to sue, namely, if the first administrator had made himself debtor to the intestate's estate for the amount of a bill received in payment of a debt due to that estate." And see *Sheets v. Pabody*, 6 Blackf. 120.

(*p*) *Barker v. Talcot*, 1 Vern. 473.

(*q*) *Catherwood v. Chabaud*, 1 B. & C. 150.

(*r*) *Catherwood v. Chabaud*, *supra*. In *Rix v. Nevins*, 26 Vt. 384, the plaintiff, as administrator of the estate of R., commenced a suit upon certain notes which R., in his lifetime, had taken of the defendant as administrator of the estate of L. (of which estate the plaintiff was also administrator *de bonis non*), and obtained judgment against the defendant on the same. *Held*, that the plaintiff, having thus treated the claim against the defendant as assets, and as the property of the estate of R., the same was subject to every legal and equitable set-off which the defendant had against R. or his estate.

(*s*) *Rawlinson v. Stone*, 3 Wilson, 1. This was an action upon a promissory note,



assignment for the private debt of the executor or administrator is a fraud on the estate of the deceased, and passes no property to an assignee who has notice or knowledge, even if he paid value.<sup>(t)</sup>

If there be several executors or administrators, the bills and notes of the deceased may be indorsed by either one of them. For they are esteemed in law but as one person ; and the acts of one of them relating to the sale and transfer of the testator's effects are the acts of all.<sup>(u)</sup> Whether the same rule will apply to notes taken by them for debts due to the estate, has been con-

payable to A or order, and indorsed by the administratrix of A. It was objected that the indorsement was not valid so as to give the indorsee an action in his own name. But the objection was overruled, "because," the reporter adds, "it is well known to be the constant practice and usage among merchants for executors and administrators to indorse and negotiate both promissory notes and bills of exchange ; and the courts of justice will always endeavor to adapt the rules of law to the usage and course of trade, *ad eam quæ frequentius accidunt jura adaptantur* ; and the courts of law are warranted in this by the words of the statute of Anne, which says, that promissory notes payable to any person or persons, his, her, or their order, shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants. The equitable interest in the note is converted into a legal interest, and the whole interest is vested in the administrator, who, before the statute, might have assigned his equitable interest, and since the statute, may now assign his legal interest." Mr. Justice *Denison* further said : " That if it had appeared to the court upon a special verdict that there was no such custom among merchants as for administrators to indorse or assign bills of exchange, it would have been a very different case from the present ; but that no such thing appeared, and in truth, that the custom is for administrators to indorse and assign bills ; that he previously had some notice of this case coming before the court, and therefore had inquired touching the usage among merchants, and been well informed that it was the constant usage amongst them for administrators to indorse and assign over bills of exchange made payable to their intestates or order." See also, *Watkins v. Maule*, 2 Jac. & W. 237, 243 ; *Shaw, C. J.*, in *Rand v. Hubbard*, 4 Met. 252, 258 ; *Owen v. Moody*, 29 Missis. 82 ; *Makepeace v. Moore*, 5 Gilman, 474.

<sup>(t)</sup> *Makepeace v. Moore*, 5 Gilman, 474 ; *Miller v. Helm*, 2 Smedes & M. 687 ; *Scott v. Scarles*, 7 Smedes & M. 498 ; *Miller v. Williamson*, 5 Md. 219.

<sup>(u)</sup> *Dwight v. Newell*, 15 Ill. 333 ; *Mosely v. Graydon*, 4 Strob. 7 ; *Wheeler v. Wheeler*, 9 Cowen, 34. In *Shep. Touch.* 484, it is said : " All the executors, where there be more than one, be they never so many in the eye of the law, are but as one man ; in which respect the law doth esteem most acts done by or to any one of them, as acts done by or to all of them. And, therefore, the possession of one of them of the goods and chattels of the deceased is esteemed the possession of them all ; payment of debts by or to one of them is esteemed payment by or to them all ; the sale or gift of one of them of the goods and chattels of the deceased, the sale and gift of them all ; a release made by or to one of them is a release made by or to them all ; and the assent of one of them to a legacy, the assent of them all. And, therefore, if there be two executors, and one of them deliver up the obligation to the debtor whereby he is bound, the other executor shall not recover it in a detinue."

sidered doubtful.(v) It would seem to depend upon the question already noticed, namely, whether such notes are to be considered as *assets*. And it being now settled that they are, it seems that they may be indorsed as effectually by one executor as by all.(w)

A delivery without indorsement by an executor or administrator does not pass the legal title, except in the case of paper transferable by delivery. And if the deceased indorsed the note in his lifetime, but did not deliver it, it has been held that a delivery by the executor will not complete the transfer. An indorsement without delivery will no more transfer the legal title, than delivery without indorsement. In the case supposed, therefore, the legal title to the note would remain in the payee at the time of his death, and would then pass to his executor, as in the case of other personal estate; and that title could be transferred only by the indorsement *and* delivery of the executor, because there is no other legal mode by which a transfer of a bill or note payable to order can be made.(x)

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(v) In *Smith v. Whiting*, 9 Mass. 334, it was *held*, that one of two executors could not assign a negotiable promissory note, made to them as executors, for a debt due to their testator. The court said: "The question is, whether one of two executors is competent to transfer by indorsement a negotiable promissory note made to the two in their character of executors. The promisees, not being copartners, had each but a moiety. One, therefore, could not assign the whole. Nor was it competent for him to assign his moiety." And see *Sanders v. Blain*, 6 J. J. Marsh. 446; *Regina v. Winterbottom*, 2 Car. & K. 37, 1 Den. C. C. 41; *Byles on Bills*, p. 40, note *p*, p. 44, note *u*.

(w) *Bogert v. Hertell*, 4 Hill, 492.

(x) Thus, in *Bromage v. Lloyd*, 1 Exch. 32, H. indorsed a promissory note, but did not deliver it. After the death of H., his executrix delivered the note to the plaintiff. *Held*, that the plaintiff had no title to sue on the note. *Pollock*, C. B. said: "This is an action on a promissory note, upon which a party has written his name, and after his death his executrix delivers the note to the plaintiffs without indorsing it; so that there is a writing of his name by the deceased, and a delivery by his executrix. Those acts will not constitute an indorsement of the note; the person to whom it is so delivered has no right to sue upon it." *Alderson*, B.: "The promissory note was made payable to the testator 'or order'; that means order in writing. The testator has written his name upon the note, but has given no order; the executrix has given an order, but not in writing. The two acts being bad, do not constitute one good act." *Rolfe*, B.: "The word 'transfer' means indorsement and delivery." So in *Clark v. Sigourney*, 17 Conn. 511, A gave his note to B, payable to B or order on a certain future day. This note B retained in his hands, doing nothing else with or in relation to it, until his death, which was long after it fell due. It afterwards came into the hands of C, the widow and executrix of B, with the name of B written in blank by him on the back of it; and C delivered it, in the state in which she found it, to D, for a valuable consideration. In an action brought by D, as indorsee of the note, against A, as the maker, alleging that B, by his indorsement in writing under his hand ordered the contents thereof to be paid

If the deceased made a valid bargain concerning a note or bill, and indorsement and delivery are necessary to carry this into effect, the executor or administrator not only may indorse and deliver the note or bill, but equity will compel him to do so. *A fortiori*, if the deceased delivered the note for a valuable consideration, without indorsement, as he thereby created a perfect equitable (though not a legal) title; the holder, having an equitable right, may in equity compel the executor to give a formal transfer.(y)

In general, it is within the power and duty of executors or administrators to present for acceptance or for payment, and give notice of non-acceptance or non-payment, and make protest, in the same manner and for the same causes as the deceased could and should have done. And all presentments and demands, and all notices, may and should be made against or given to them in like manner as against or to the deceased. These things will be stated more fully in the chapters on Presentment, Demand, and Notice. There is, however, a difference between the origin and commencement of the powers and duties of an executor, and

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to D, it was *held* (*Williams*, C. J. and *Waite*, J. dissenting), — 1. That as D claimed title to the note, by an immediate indorsement of it to him by B, it was necessary for D, in order to sustain that title, to prove such an indorsement; 2. That the word *indorsement*, as applicable to negotiable paper, imports a transfer of the legal title to the instrument, by contract; 3. That the consummation of this contract must be shown, by a delivery by the party making the transfer to the party to whom it is made, and an acceptance by the latter, the mere act of the payee's writing his name on the back of the instrument not being sufficient for this purpose; 4. That the legal title of the note being in B at the time of his death, it then vested in C, his executrix, and could be transferred only by her indorsement; 5. That C, as executrix, or otherwise, had no authority to deliver the note as a note indorsed by B; 6. That D, consequently, had acquired no legal title; 7. That as the note came into D's hands after it became due, it was subject to the defence of want of legal title in him. So in *Clark v. Boyd*, 2 Ohio, 56, it was *held*, that an assignment indorsed upon a note, and the note retained by the assignor until his death, vests no interest in the assignee. The court said: "The assignment made by the assignor, while the note remained in his possession, and where no contract of sale was proved, was a mere nullity. It was in his own power, and could at any time be legally erased. It gave no interest or title to the assignee, and when Pierce died he was the absolute owner of the note, notwithstanding the assignment. The right vested by his death in the executors, and could only be assigned by them. The plaintiff acquired no more right by a delivery from the hands of the executors than he could have acquired had they delivered him a note payable to the testator, without any indorsement." See also *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11.

(y) *Watkins v. Maule*, 2 Jac. & W. 237; *Malbon v. Southard*, 36 Maine 147.

those of an administrator. The first begin from the appointment in the will, both as to source and as to time; and, therefore, an executor may do and receive these things after the death of the testator, and before probate of the will. But an administrator, although the persons who have a right to the administration are pointed out by the law, derives all his authority from the appointment as an act of the law, and therefore can do nothing until the appointment.(z)

If there be probate of a will, the executor therein named is fully authorized to be regarded as such, until the probate is annulled. Hence payment to an executor under a forged will is valid after probate, but not before. But this must be qualified so far as to prevent a party, having knowledge of the forgery and making the payment in fraud, from profiting by his fraud.

An administrator or executor can only bind himself by his contracts; he cannot bind the assets of the deceased. Therefore, if he make, indorse, or accept negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office, signing a note, for example, "A, as executor of B; for this will be deemed only a part of his description, or will be rejected as surplusage.(a) But if he chooses to exclude his personal liability expressly, as by the words, "I promise to pay, &c. out of the assets of C. D., deceased, and not otherwise," or use any clearly equivalent language, then he is only bound so far as the assets extend. But the instrument, in that case, will not be a bill of exchange or promissory note, because not payable at all events. The same rule is applicable to guardians, trustees, and all persons acting in a representative capacity, except agents.(b)

At common law, an executor was considered as residuary legatee. For this reason, and also for the technical reason that an executor could not sue himself, if the payee and holder of a note made the maker his executor, the note was thereby dis-

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(z) *Woolley v. Clark*, 5 B. & Ald. 744; *Rand v. Hubbard*, 4 Met. 256; *Allen v. Dundas*, 3 T. R. 125.

(a) *Childs v. Monins*, 2 Brod. & B. 460; *King v. Thom*, 1 T. R. 489; *Aspinall v. Wake*, 10 Bing. 55; *Davis v. French*, 20 Maine, 21; *Walker v. Patterson*, 36 Maine, 273.

(b) *Thacher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58. And see *ante*, pp. 36, 80, 89-91.

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charged ; and if the holder of a bill appointed the acceptor his executor, this discharged the acceptor, and therefore all subsequent parties.(c) The only exceptions were, that the rule did not apply if the assets were not enough, without the bill or note, to pay the creditors, and perhaps, for this is not clear, the legatees ; or that the executor refused the appointment.(d) For the rule has been applied where, of several joint debtors, one was appointed executor ; (e) and even although they were joint and several ; and although the person appointed executor died without having proved the will.(f)

This rule was never held to apply to administrators ; (g) nor does it exist in equity in respect to executors. The debt is considered to have been paid by the executor to himself, and becomes assets in his hands.(h)

In this country, the action upon a note or bill by an executor against an executor is as impossible as in England ; but a principle similar to that of the equity courts in England has always prevailed in the probate courts of this country. That is, the executor is charged with the amount of the debt as if paid to him.(i) An administrator must account for his debt to his intestate in the same way. And it has been said that the reasons for the discharge of the right of action apply as effectually to an administrator as to an executor.(j)

A bequest of a bill or note to a party liable upon it discharges his liability, of course. But a bequest to any party " of all the property " in a house does not, it is said, carry to him any bills or notes contained in the house ; unless they are bank-notes, which are considered as cash.(k) We should be inclined to think, however, that a bequest of " property," or a bequest using

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(c) *Freakley v. Fox*, 9 B. & C. 130 ; *Wankford v. Wankford*, 1 Salk. 299 ; *Cheetam v. Ward*, 1 B. & P. 630 ; *Nedham's Case*, 8 Rep. 135 ; *Byles on Bills*, 41 note v.

(d) *Wankford v. Wankford*, 1 Salk. 299 ; *Abram v. Cunningham*, 1 Vent. 303

(e) *Com. Dig. Admin. B. 5.*

(f) *Wankford v. Wankford*, 1 Salk. 299 ; *Com. Dig. Admin. B. 5.*

(g) *Nedham's Case*, 8 Rep. 135.

(h) *Williams on Executors*, 816 ; per Lord *Tenterden*, C. J., in *Freakley v. Fox*, 9 B. & C. 134.

(i) *Ipswich Man. Co. v. Story*, 5 Met. 310.

(j) *Stevens v. Gaylord*, 11 Mass. 256.

(k) *Byles on Bills*, 135, note g.

any equivalent word, so described as to include and contain in fact negotiable instruments, would pass them, unless something in the will opposed this construction. If the paper was payable to bearer, or was indorsed in blank, and in either way negotiable by delivery, we should more confidently expect that it would go to the legatee.

## SECTION X.

### OF CORPORATIONS.

At common law a corporation could bind itself only by its seal, and its written name was apparently of no use but to verify its seal. This rule was subject to certain exceptions, however, at a very early period; and in modern times, with the great increase of mercantile and trading corporations, it has been greatly relaxed.<sup>(l)</sup> In this country it was long since entirely discarded.<sup>(m)</sup> In England, at the present day, a corporation may draw or accept bills of exchange, when expressly authorized by its charter, or when it is imperatively necessary for the conducting of its legitimate business; as in the case of banking and trading corporations.<sup>(n)</sup> But according to the better opinion, the power is confined to these cases. Therefore, it seems that a corporation, created for the purpose of supplying the inhabitants of a city with water, cannot accept a bill of exchange

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(l) See *Henderson v. Australian Royal Mail Steam Nav. Co.*, 5 Ellis & B. 409; *Australian Royal Mail Steam Nav. Co. v. Marzetti*, 11 Exch. 228; *Fishmongers' Company v. Robertson*, 5 Man. & G. 131; *Clark v. Cuckfield Union*, 1 Lowndes & M. 81, 11 Eng. L. & Eq. 443; *Copper Miners' Co. v. Fox*, 16 Q. B. 229; *Diggles v. London & Blackwall Railway Co.*, 5 Exch. 442; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Arnold v. Mayor of Poole*, 4 Man. & G. 860; *Paine v. Strand Union*, 8 Q. B. 326; *Lamprell v. Billericay Union*, 3 Exch. 283; *Sanders v. St. Neot's Union*, 8 Q. B. 810; *Church v. Imperial Gas Light & Coke Co.*, 6 A. & E. 846; *Smart v. West Ham Union*, 10 Exch. 867; *Smith v. Cartwright*, 6 Exch. 927; *Beverley v. Lincoln Gas Light & Coke Co.*, 6 A. & E. 829; *Reuter v. Electric Telegraph Co.*, 6 Ellis & B. 341, 37 Eng. L. & Eq. 189; *Lowe v. London & Northwestern Railway Co.*, 18 Q. B. 632.

(m) *Bank of Columbia v. Patterson*, 7 Cranch, 299. And see cases cited in 1 Parsons on Cont. 118, note c.

(n) The Bank of England and the East India Company are instances. See *Rex v. Bigg* 3 P. Wms. 419; *Edie v. East India Co.*, 2 Burr. 1216; *Murray v. East India Co.*, 5 B. & Ald. 204.

in England.(o) In this country, however, it may be regarded as settled, that the power of corporations to become parties to bills of exchange or promissory notes is coextensive with their power to contract debts. Whenever a corporation is authorized to contract a debt, it may draw a bill or give a note in payment of it. Every corporation, therefore, may become a party to bills and notes for some purposes.(p) Thus, a mere religious corporation may need fuel for its rooms, and as an economical measure may buy a cargo of coal, and give its note for it; and

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(o) *Broughton v. Manchester & S. Water Works Co.*, 3 B. & Ald. 1. *Bayley, J.* said "The act of Parliament, by which this corporation is established, does not contain any express power by which they are enabled to become parties to bills of exchange or promissory notes, nor is there anything in the purpose for which this corporation was established from which it is to be implied that such a power was meant to be given. It seems to me that the drawing of bills of exchange was quite foreign to the purpose for which this corporate body was established, which was for the erecting and carrying on waterworks in a particular place. There being no power expressly given to them to make promissory notes, or to become parties to bills of exchange, I should doubt very much whether such a corporation would have any power so to bind themselves for purposes foreign to those for which they were originally established." *Best, J.* said: "I am of opinion that this action is not maintainable, because this case comes within that rule of law by which corporations are prevented from binding themselves by contract not under seal. When a company like the Bank of England, or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated, that they should have power to accept bills or issue promissory notes; it would be impossible for either of these companies to go on without accepting bills. In the case of *Slark v. Highgate Archway Co.*, 5 Taunt. 792, the Court of Common Pleas seemed to think, that unless express authority was given, by the act establishing the company, to make promissory notes *eo nomine*, a corporation could not bind itself except by deed. Now there is nothing in the act of Parliament establishing this company, which authorizes them to bind themselves, except by deed. The company, too, was not created for the purposes of trade, but merely to carry on the business of supplying the inhabitants of a particular place with water. Now it cannot be necessary, for this purpose, that they should become the makers of promissory notes, or the acceptors of bills of exchange. As, therefore, the nature of the business in which they are engaged does not raise a necessary implication that they should have the power to accept bills, and as no authority is expressly given by the act of Parliament for that purpose, I am of opinion, on this ground, that this action cannot be maintained." The case, however, was decided on another ground. See also, *East London Water-Works Co. v. Bailey*, 4 Bing. 283.

(p) *Barker v. Mechanic Ins. Co.*, 3 Wend. 94; *Mott v. Hicks*, 1 Cowen, 513; *Planters' Bank v. Sharp*, 6 How. 301, 302; *Marvine v. Hymers*, 2 Kern. 223; *Bank of Genesee v. Patchin Bank*, 3 Kern. 309; *Moss v. Oakley*, 2 Hill, 265; *McCullough v. Moss*, 5 Denio, 567; *Attorney-General v. Life and Fire Ins. Co.*, 9 Paige, 470; *Came v. Brigham*, 39 Maine, 35; *Munn v. Commission Co.*, 15 Johns. 44; *Kelley v. Mayor of Brooklyn*, 4 Hill, 263; *New York Floating Derrick Co. v. New Jersey Oil Co.*, 3 Duer, 648.



such a note would undoubtedly be valid in this country.(q) So also a bill or note given by a corporation will be presumed to have been given in the course of its legitimate business, until the contrary appears.(r) And a note given by a corporation will, it seems, be valid in the hands of a subsequent indorsee, without notice, whatever may be the purpose for which it was given ; (s) and we think it would be valid in the hands of the payee, unless the transaction was clearly fraudulent, and the payee, either from actual knowledge or the nature of the transaction, had notice of it. If, for example, the Trustees of Columbia College in New York bought a cargo of cotton, and gave their negotiable note for twenty thousand dollars, the seller might suppose that they had need of some means of transmitting a large amount of money, and found that they could do it to most advantage by using this cotton ; or that they wanted it for some other legitimate purpose. Such a note would clearly be valid in the hands of a *bona fide* holder without notice ; nor do we think that the nature of the transaction merely would be notice to the original payee that it was given for an unauthorized purpose.(t)

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(q) See cases *supra*.

(r) *Barker v. Mechanic Ins. Co.*, 3 Wend. 94 ; *Hart v. Missouri State Mut. F. & M. Ins. Co.*, 21 Misso. 91 ; *Safford v. Wyckoff*, 4 Hill, 442. See *McCullough v. Moss*, 5 Denio, 567.

(s) *Bank of Genesee v. Patchin Bank*, 3 Kern. 309 ; *Willmarth v. Crawford*, 10 Wend. 341. But see *Halstead v. Mayor of New York*, 5 Barb. 218, 3 Comst. 430.

(t) In *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137, it was *held*, that if an incorporated company purchase property and convert it to their own use, they will not be permitted to defeat a recovery for the price, by showing that the purchase, on account of the nature of some of the property, was probably, though not necessarily, an abuse of the powers granted by their charter ; otherwise, if the vendor was apprised at the time of the sale that the company were acting in violation of their charter. In that case, the Rossie Lead Mining Company, a corporation, purchased a large amount of property which had been previously used by the vendor in carrying on the business of washing and smelting lead ore, consisting in part of a house and lot, fifty acres of improved land with several houses thereon, a building which had been used for a store, a school-house, threshing-machine, &c. *Held*, in an action upon one of several notes given for the purchase-money, that the purchase was not necessarily an excess of the power granted by the charter, and that the plaintiff was, therefore, entitled to recover. *Cowen, J.* said : " I am not aware that a corporation, more than another, may purchase and convert an article to its own use, and then object that it acted beyond the statute power. It is itself a sort of agent, and must be the judge as between itself and the vendor whether the article be wanted or not. The vendor cannot pronounce upon the question. A school-house or threshing-machine may be useful, though it be con-



If it appears upon the face of a bill or note made by a corporation, that the corporation was prohibited from making it, it has been held that every holder must take notice of this at his peril.<sup>(u)</sup>

A corporation is not authorized, it is said, to give a note for the accommodation of a third person ; and any one who receives such a note, with notice of the circumstances under which it was given, cannot recover upon it.<sup>(v)</sup> We cannot but think, however, that there may be exceptions to this rule.

ceded that the corporation have no power to keep school, hire a schoolmaster, or embark in the employments of agriculture. The materials of either may have been desirable for improving the legitimate apparatus. Being on the spot, it might have been thought prudent to take them to pieces and devote their parts to lawful repairs. The purpose is a secret between the company and the hands that transact their business ; and as against the vendors, who have not been told that the purchase was an idle one, the company must be estopped. If they really abuse their power in making purchases of that sort, the people have a remedy by information in the nature of a *quo warranto*. The vendor knows not, nor can he conjecture, that his vendees are engaged in violating the policy of the country. He is innocent ; the vendees alone are guilty." But see *McCullough v. Moss*, 5 Denio, 567. See also *Indiana v. Woram*, 6 Hill, 33.

(u) Thus, in *Broughton v. Manchester & S. Water-Works Co.*, 3 B. & Ald. 1, it was held, that a corporation, other than the Bank of England, could not be acceptors of a bill of exchange, payable at a less period than six months from the date ; because such a case falls within the provision of the several acts of Parliament passed for the protection of the Bank of England, by which it is enacted, that it shall not be lawful for any body corporate to borrow, owe, or take up any money upon their bills or notes payable at demand, or at any time less than six months from the borrowing thereof ; and the objection appearing on the face of the bill, no recovery could be had thereon by any subsequent indorsee. *Holroyd, J.* said : " I take it to be clear, that where a statute prohibits a thing to be done, and does not expressly avoid the securities which fall within the prohibition, there, if the violation of the law does not appear on the face of the instrument, and the party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such a person. . . . But here the defendants are made a corporation by a public act of Parliament, and every person is bound to take notice of that act ; and when, therefore, a holder of a bill, though a *bona fide* indorsee, takes the defendants' acceptance, he must know that they are a body corporate ; and he therefore receives it, knowing it to be the acceptance of a corporation prohibited from owing money on such a bill : he is not, therefore, an innocent indorsee, because he takes a bill which he knows to be prohibited by statute " And see *Safford v. Wyckoff*, 1 Hill, 11, 4 Hill, 442 ; *Attorney-General v. Life and Fire Ins. Co.*, 9 Paige, 470.

(v) It was so decided in the recent case of *Bank of Genesee v. Patchin Bank*, 3 Kern. 309. *Denio, J.* said : " It is quite clear that the officers of a banking association or other corporation have no power to engage the institution as the surety for another, in a business in which it has no interest. Such a transaction is without the scope of the business of the company. The authority of the governing officers of a corporation, to affect it by their contracts in its name, is of the same general character as that

It may be added, that a corporation may be sued in *assumpsit* on any simple contract which they have power to make.

They can make a note or accept a bill only by an agent or attorney. But they can give the requisite authority by vote, or by conferring any powers or any employment upon an agent, which, by a reasonable implication, gives this authority. Thus, a general agent for business in which notes are frequently given, may give the note of the corporation.<sup>(w)</sup>

But an agent or factor employed for a specific business cannot go beyond it and give a note. Thus, in Massachusetts many years ago it was held, that an agent authorized to sell goods for a corporation, and to purchase the stock of which they were made, and even to purchase this on credit, could not give the note of the corporation.<sup>(x)</sup> And more recently, the Supreme Court of the same State held, that an agent authorized by a corporation to advance money to a mortgagor of land to them, for a specific purpose, could not bind them by giving their note for the same amount.<sup>(y)</sup>

A corporation, like a natural person, may transact its business in the name of an agent; and the agent's name is then, *pro hac vice*, the name of the corporation. If, therefore, the agent of a corporation gives a bill or note in his own name, but for the debt or in the business of the corporation, and it appears that this was the mode in which the corporation usually transacted its business, it will be bound.<sup>(z)</sup>

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which a partner has to bind the firm. In either case, if they contract in a matter to which the business of the corporation or partnership does not extend, their engagements are invalid as against the corporation, for want of authority to conclude those in whose behalf they assume to act. I do not speak now of a case where the particular transaction is forbidden by some positive law, or is hostile to some principle of public policy, but simply as to cases where the question relates to the authority of the agent. . . . . The officers of a bank have no right to indorse in its behalf the paper of other persons in which it has no interest, or to make the bank a party to paper for the accommodation of any one. Such contracts are void, upon the same principle that an indorsement by a partner of the firm name, without the consent of his copartners, for the accommodation of a third person, would be inoperative against the firm."

(w) See *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. 282; *Melledge v. Boston Iron Co.*, 5 Cush. 158.

(x) *Emerson v. Providence Hat Man. Co.*, 12 Mass. 237.

(y) *Webber v. Williams College*, 23 Pick. 302. And see *ante*, p. 116, note s.

(z) This point was much considered in *Melledge v. Boston Iron Co.*, 5 Cush. 158. That was an action against the defendants on certain promissory notes, signed "Horace Gray & Co." At the trial the judge instructed the jury, that, as the defend

If a corporation, certainly authorized to make, sign, accept, or indorse negotiable paper, has an officer authorized to use their name in this way, and this officer writes his own name, as drawer of a bill of exchange, with the express addition of

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ants' corporate name did not appear on the notes, and the notes on their face did not disclose any agency, Horace Gray & Company, the signers, and not the defendants, were bound thereby; but that this was not to be understood to prevent the plaintiff from maintaining his action, if the jury should be satisfied that the notes were in fact the notes of the Boston Iron Company, executed under a name adopted and sanctioned by them as indicative of their contracts. It was *held*, that this instruction was correct. *Shaw*, C. J. said: "The effect of the instruction thus given, we think, was, that the facts mentioned in the prayer for instructions, to wit, the corporate name not appearing on the notes, and the notes not disclosing any agency, but signed Horace Gray & Company, constituted *prima facie* evidence that those were the notes of Horace Gray & Company and not of the Boston Iron Company; and, standing alone, would warrant and require the direction, that Horace Gray & Company, and not the Boston Iron Company, were bound by them; but that this evidence might be rebutted and controlled by proof *aliunde* that they were in fact the notes of the Boston Iron Company, because executed under a name adopted and sanctioned by them as indicative of their contracts, and, it may be added, given in satisfaction of their debt. The court are of opinion that this direction was correct. If by any possible proof the presumption arising from the face of the note, and from the form of the execution, from the corporate name of the company not being used, and the use of the name of a mercantile firm, could be rebutted, then the evidence was *prima facie*, and not conclusive. It seems to be now well settled, in this Commonwealth, since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest, and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligation; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and, generally, by those legal and equitable considerations which affect the rights of natural persons. We are not dealing here with the weight, force, or effect of the evidence, but only whether any evidence *aliunde* could control the presumption arising from the notes; and we think there was evidence competent to go to the jury, from which they might infer that the defendants had so adopted a name, other than their corporate name, for the special purpose of giving notes, as to be bound by it when used by a general agent, in liquidation of their own debts. . . . Under this same objection, also, the question was discussed, whether a corporation can adopt the name of a mercantile firm, and bind themselves by notes given in its name. It may not be a wise arrangement, but we are not prepared to say they cannot do it. Suppose the case, which actually occurred, as appears in the case of *Goddard v. Pratt*, 16 Pick. 412, that a manufacturing corporation pass a vote or by-law, providing that all their mercantile business shall be done and contracts made in the name of a partnership, whose stock they have taken, and to whose business they have succeeded. This may be wise in such a case, in order to keep up an established, extensive, and valuable correspondence, and retain the run of custom and good-will, of an old, established firm. That case was the reverse of the present, and the struggle there was to charge the firm, who defended on the ground that their firm name designated the obligations of the company, and not their own; and the case

his office, it seems that he will be held to do this officially, and not personally, and to bind the corporation and not himself.(a) And a bill drawn upon and accepted by him in the same way, will be held to have been drawn upon and accepted by the corporation.(b)

Any signature of a corporation should always be by writing the name of the corporation, and adding, "by A. B., agent," or "treasurer," &c. And the body of the instrument should contain the name of the corporation only. But it is very common to find a note running "I, A. B., Treasurer of — Company, promise," &c., and signed "A. B., Treasurer of — Company"; and a note actually of the corporation, if made and signed in this way, should, we think, be held in law to be their note.(c)

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turned on the question, whether the plaintiff, when he dealt with them, knew of the dissolution of the old firm; if he did not, then, by a well-known rule of the law of partnership, the firm was bound to him, not having given notice of their dissolution. Had the point in that case been whether the corporation were bound, we can have no doubt that they would have been held bound by their vote for notes made in the name designated." And see, to the same effect, *Conro v. Port Henry Iron Co.*, 12 Barb. 27, 55. See also, *ante*, p. 92, note g.

(a) Thus, in *Witte v. Derby Fishing Co.*, 2 Conn. 260, a bill was drawn by the president of the company, containing a direction to the drawee to place the amount "to account of the Derby Fishing Company," and signed "Canfield Gillet, President." *Held*, that the company were liable as drawers. So in *Safford v. Wyckoff*, 1 Hill, 11, 4 Hill, 442, it was *held*, that a bill of exchange commencing, "Farmers' Bank of Seneca County," directing the drawee, after payment, to "charge this institution," and signed "J. J. Fenton, Cashier," was to be deemed the act of the bank. But in *Kean v. Davis*, 1 N. J. 683, where a bill of exchange directed the drawee to "charge as ordered," and was signed "John Kean, President E. & S. R. R. Co.," it was *held*, that Kean was, *prima facie*, personally liable as drawer.

(b) In *Shelton v. Darling*, 2 Conn. 435, the bill was directed to "Noyes Darling, Esq., Agent of the Commission Company," and was accepted "Noyes Darling, Agent C. C." *Held*, that it was the acceptance of the company, and not of Darling. So in *Farmers' and Mechanics' Bank v. Troy City Bank*, 1 Doug. Mich. 457, it was *held*, that a bill of exchange directed to "John A. Welles, Cashier Farmers' and Mechanics' Bank of Michigan," and accepted by writing across the face thereof, "Accepted, John A. Welles, Cashier," was drawn upon and accepted by the bank, and not by Welles in his individual capacity. In *Moss v. Livingston*, 4 Comst. 208, a bill was drawn on, and accepted by "J. R. L., President of the Rosendale Manufacturing Co." That company was a corporation, and J. R. L. was the president; but there was no proof that he was authorized to bind the company by his acceptance. *Held*, that an action on the acceptance was properly brought against J. R. L. individually. See *ante*, p. 97, note o.

(c) *Mann v. Chandler*, 9 Mass. 335. But see *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. 94; *Brockway v. Allen*, 17 Wend. 40; *Hills v. Bannister*, 8 Cowen, 31; *M'Clure v. Bennett*, 1 Blackf. 189; *Mears v. Graham*, 8 Blackf. 143; *Cleaveland v. Stewart*, 3 Ga. 283.

If the note begins, "The President and Directors of — Company promise," &c., and is signed "A. B., President," or "Secretary," or "Cashier," or "Treasurer," or "Agent," it is undoubtedly the note of the corporation.(d) In fact bank-bills are universally signed in this way. It has been said, that if a note be in this form, "I, John Franklin, President of the Mechanic Fire Insurance Company, promise," &c., (Signed) "John Franklin"; or in this form, "I promise to pay," &c., (Signed) "John Franklin, President of the Mechanic Fire Insurance Company"; that in both of these cases it is the note of Franklin, and not of the Company.(e) But we doubt the correctness of these positions. There can be no reasonable doubt, in either of the above cases, that the intention was to bind the company, and not the president personally.(f)

If a bill or note is made payable to "A. B., Cashier," we have authority for saying that an action may be maintained upon it, either by A. B. personally,(g) or by the bank of which he is cashier, if the paper was actually made and received on account of the bank.(h) And where a promissory note was made payable "to the Cashier of the Commercial Bank or his order," and the consideration proceeded from the bank, it was held, that an action on the note might be maintained in the name of the bank as the promisee.(i) A note or bill made

(d) *Mott v. Hicks*, 1 Cowen, 513; *Pitman v. Kintner*, 5 Blackf. 250; *Commercial Bank v. Newport Man. Co.*, 1 B. Mon. 13; *Shotwell v. M'Kown*, 2 South. 328. In *Fitch v. Lawton*, 6 How. Miss. 371, the note was in the following form: —

POST NOTE.

\$100. — No. 40.

"Commercial Bank of Rodney,  
Rodney, Miss., 8 March, 1839.

Six months after date, we promise to pay R. W. Worthington or order one hundred dollars, at the bank in Rodney, with five per cent. interest until due.

J. Lawton, Cash'r.

Thomas Freeland, Pres't."

*Held*, that *prima facie* it was binding upon Freeland and Lawton individually. *Sed quare*.

(e) Per *Savage*, C. J., in *Barker v. Mechanic Fire Ins. Co.*, 3 Wend. 94.

(f) See *Lindus v. Melrose*, 3 H. & N. 177; *Aggs v. Nicholson*, 1 H. & N. 165; *Healey v. Story*, 3 Exch. 3; *Penkivil v. Connell*, 5 Exch. 381.

(g) *Fairfield v. Adams*, 16 Pick. 381; *Shaw v. Stone*, 1 Cush. 228, 254.

(h) *Watervliet Bank v. White*, 1 Denio, 608; *Barney v. Newcomb*, 9 Cush. 46; *Du-pont v. Mount Pleasant Ferry Co.*, 9 Rich. 255; *Wright v. Boyd*, 3 Barb. 523.

(i) *Commercial Bank v. French*, 21 Pick. 486. *Morton*, J. said: "The note is in terms payable 'to the cashier of the Commercial Bank'; and the defendant contends that the action should have been brought in the name of the person who was then cashier, and will not lie in the name of the corporation. It is not denied that the prop-

payable to the order of the cashier of a bank authorized by its charter to indorse, is as negotiable as if payable to the order of the bank.(j)

If a bill or note belonging to a bank be indorsed "A. B., Cashier," there may be some doubt whether this alone will be sufficient to pass the property in the note; and still more would it be doubtful whether it would render the bank liable as indorser. But it has been satisfactorily established that the holder may fill up such an indorsement so that it will read "The President and Directors of — Bank, by A. B., Cashier.(k) We have already seen that such an indorsement will

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erty of the note is, and ever has been, in the plaintiffs; but the argument is, that the promise being in the name of the cashier, although made to him in trust, and for the benefit of the corporation, it can only be enforced in his name. . . . A contract may be made to or with a person, as well by description as by name. And where the parties can be ascertained, it will be valid, although their names be mistaken or their description be incorrect. It cannot be doubted that a note to the Commercial Bank would be valid, and might be declared on as a promise to the plaintiffs, although their legal name is, 'The President, Directors, and Company of the Commercial Bank.' So a contract with the stockholders, or with the president and directors, or with the directors of the Commercial Bank, would doubtless be, in its legal effects, a contract with the corporation. It is not easy to perceive why a contract with the cashier of a bank is not a contract with the bank itself. The accounts of banks with each other are usually kept in form with the cashiers, but undoubtedly the banks themselves are the real parties to them. *The Master, &c. of Sussex Sidney College v. Davenport*, 1 Wilson, 184. A corporation being an incorporeal being, and having no existence but in law, can neither make nor accept contracts, receive nor pay out money, but by the agency of its officers. They are the hands of the corporation by which they execute their contracts, and receive and make payments. Of these officers the cashier is the principal. If the note had been made to the corporation, by its appropriate name, the same officer would have demanded and received payment, or would have given notice of non-payment and protested it, and, had it been negotiated, would have made the indorsement, and in precisely the same form as he would upon this note. . . . The principle is, that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the corporation, whether a right or a wrong name, whether the name of the corporation or of some of its officers be used, it should be declared on and treated as a promise to the corporation. And there is no so safe criterion as the consideration. If this proceed from the corporation, it raises a very strong presumption that the promise is made to them. If no express promise be made, but it be left to legal implication, it must be to them." And see *Medway Cotton Manufactory v. Adams*, 10 Mass 360.

(j) *Haynes v. Beckman*, 6 La. Ann. 224.

(k) *Northampton Bank v. Pepoon*, 11 Mass. 288; *Folger v. Chase*, 18 Pick. 63. In the recent case of *Bank of Genesee v. Patchin Bank*, 3 Kern. 309, where the indorsement was in the same form, and the action was brought against the bank as indorser, *Denio, J.* said: "I find some difficulty in saying that this indorsement, as it stands, can be held to be the contract of the defendant. But I am of opinion that the defend-



not render the cashier personally liable.(l) A person who carries on business on his own account, in the name of a company which has been incorporated but not organized, and receives in payment of a debt contracted with him in such business a promissory note payable to the order of the corporation, may transfer the note by indorsing it in his own name.(m)

It is doubtful whether the president, secretary, treasurer, cashier, or any other officer of a corporation, has *prima facie* a general authority to bind the corporation as a party to bills

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ant should be held liable as indorser upon a different principle, — that of allowing the indorsement to be filled up according to the intention of the parties. In the *Northampton Bank v. Pepoon*, 11 Mass. 288, the defendant was sued as the maker of a negotiable promissory note, which had been indorsed to and held by the Berkshire Bank ; and the question was, as to the transfer by that bank to the plaintiff. The indorsement was by one Learned, an attorney, with full authority from the board of directors ; but the form in which it was done was by the attorney writing his own name upon the note, adding, 'as attorney' The formal words of a common indorsement appear to have been in the first instance written over the name of the attorney, but the court allowed it to be altered and filled up as an indorsement by the Berkshire Bank, according to the intent. The court, Chief Justice *Parker* giving the opinion, upon a motion for a new trial, said : ' We are all satisfied that if the authority of Learned was good to indorse as attorney, the plaintiffs may erase the words written over his name, and substitute other words, which will give effect to the indorsement.' *Folger v. Chase*, 18 Pick. 63, presented substantially the same question. The plaintiff, in an action against the prior parties to several notes which had been indorsed to, and held by, the Phoenix Bank, made title to the notes by the indorsement of the cashier of that bank made in the same form with that of the bill in question, namely, ' P. H. Folger, Cashier.' It was held that the plaintiffs were entitled to recover, the court saying : ' As to the objection that the indorsement is not made in the name of the corporation, we think the indorsement by the cashier, in his official capacity, sufficiently shows that the indorsement was made in behalf of the bank ; and if that is not sufficiently certain, the plaintiffs have a right now to prefix the name of the corporation.' It will not fail to be remarked, that these actions were not against the bank whose officers had indorsed the paper, but against prior parties ; but the question in each case was as to the effect of what had been done towards transferring the paper. This, however, does not affect their application to this case ; for if the indorsement operated to transfer the paper upon the principles of the law merchant, it at the same time created by force of the same law the obligation of indorser. If the holder in these cases could write the name of the corporation over the signature of the officer, the contract would then be in the usual form, and would carry with it the ordinary consequences. The principle thus settled by the Supreme Court of Massachusetts carries into effect the intention of the parties to such transactions, is in accordance with legal analogies, by which effect is given to indorsements on negotiable paper by allowing them to be filled up in such manner as to carry out what was designed, and is not opposed to any case in our own courts. I am disposed to follow it in this case." The point was not decided by the court.

(l) See *ante*, p. 96, note m.

(m) *Bryant v. Eastman*, 7 Cush. 111.

of exchange or promissory notes.(n) It has been held, however, that the cashier of a bank has *prima facie* authority to indorse all paper belonging to the bank, so as to pass the property and render the bank liable as indorser.(o) That he has authority to indorse, for the purpose of collection merely, there is no doubt.(p) It may be well to remember, that at common

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(n) See *Moss v. Livingston*, 4 Comst. 208; *McCullough v. Moss*, 5 Denio, 567; *Farmers' and Mechanics' Bank v. Troy City Bank*, 1 Doug. Mich. 457.

(o) Thus, in *Wild v. Bank of Passamaquoddy*, 3 Mason, 505, *Story*, J. said: "The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case it is incumbent on the bank to show that it has interposed a restriction, and that such restriction is known to those with whom it is in the habit of doing business. In the present case, the cashier has, as cashier, indorsed the bill in behalf of the bank, and this is *prima facie* evidence of authority, it being within the ordinary duties performed by such an officer. If he was restricted in his authority, it is for the defendants to show it. The proof is in their possession, and the plaintiff, who is a stranger to their regulations, cannot be presumed to be conusant of it." So in *Fleckner v. U. S. Bank*, 8 Wheat. 338, 360, *Story*, J., delivering the opinion of the court, said: "We are very much inclined to think that the indorsement of notes, like the present, for the use of the bank, falls within the ordinary duties and rights belonging to the cashier of the bank, at least if his office be like that of similar institutions, and his rights and duties are not otherwise restricted. The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, &c., to be used, from time to time, for the ordinary and extraordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes, and other property, when payments have been duly made. He draws checks, from time to time, for moneys, wherever the bank has deposits. In short, he is considered the executive officer, through whom, and by whom, the whole moneyed operations of the bank in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds as the moneyed capital of the bank to discharge its debts and obligations." And see, to the same effect, *Everett v. United States*, 6 Port. Ala. 166; *Harper v. Calhoun*, 7 How. Miss. 203; *Farrar v. Gilman*, 19 Maine, 440. But see *U. S. Bank v. Fleckner*, 8 Mart. La. 309, and cases cited in next note.

(p) *Hartford Bank v. Barry*, 17 Mass. 94; *Elliot v. Abbot*, 12 N. H. 549. This was an action of assumpsit, upon a promissory note, dated September 30, 1839, payable to the President, Directors, and Co. of the Ashuelot Bank, or order, in sixty days and grace, and alleged to be indorsed by the cashier of the bank to the plaintiff. The note in question was signed by John Townsend as principal, and by the defendant as surety, and had upon it the indorsement of the cashier of the bank. In giving the opinion of the court, *Parker*, C. J. said: "Although the bank never had any interest in this note, we see no objection to regarding it as having been made to them, and indorsed to the



law no stockholders of any corporation are liable for its debts, in any form. But this rule is importantly qualified by statutes in many of our States.

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plaintiff, if the indorsement can be upheld upon the evidence. The signers did promise to pay the bank ; and as they made the promise negotiable, the bank might well transfer it. And it makes no difference to the defendant, whether the bank discounted the note, and then sold and indorsed it to the plaintiff ; or whether the plaintiff, having funds in the bank, furnished the money in the first instance, the bank indorsing the note to him, and the defendant assenting to the transfer. We come, then, to the question, Has this note been indorsed to the plaintiff, by the bank ? Is that allegation in the plaintiff's declaration sustained ? The defendant may deny this. . . . . The ground upon which the cashier may indorse the name of the bank, and transfer the legal interest, in any case, is not because the indorsement is merely nominal, transferring no actual property. If it were so, this indorsement might be supported as the indorsement of the bank. But it is, that the cashier is the agent of the bank for that purpose ; — that, by virtue of his appointment as cashier, the bank authorizes him to make indorsements in such cases. Tested by this principle, the indorsement in this case must fail. It is not the act of the bank, because not made by an agent having power to make an indorsement in such case. The directors are the general agents of the bank. The cashier is a special agent, and a matter of this kind is not within the scope of his authority. The plaintiff's allegation that the note was indorsed by the bank, therefore, fails ; and this is a material allegation as the case now stands."

## CHAPTER VI.

## OF THE CONSIDERATION.

## SECTION I.

OF THE GENERAL PRINCIPLES IN RELATION TO THE CONSIDERATION  
OF NOTES AND BILLS.

By the rules of the common law, no promise which is not made for a consideration can be enforced. This consideration may be either a gain or benefit of any kind to him who makes the promise, or a loss or injury of any kind suffered by him to whom it is made; such gain being the cause of or the inducement to the promise, and the promise being the cause of or the inducement to such loss.

To this rule there is an exception, by the ancient law, in favor of a written promise which has a seal attached to it; or, as it is commonly expressed, a promise under seal; for the seal, according to the law, imports a consideration. And there is another more recent exception by the law merchant, in favor of negotiable bills and notes in the hands of third parties.

Even as between immediate parties, this exception has some application. For as between them, unlike the case of other parol contracts, a consideration is presumed in the first instance, and therefore need not be proved. But this presumption may be rebutted by evidence; and proof that there was no consideration in fact will constitute a perfect defence. As to subsequent *bona fide* holders, on the other hand, this presumption is conclusive. As to them, it is immaterial whether there was any consideration between prior parties or not. Therefore a maker cannot defend himself, on the ground that he promised without consideration, against the suit of an indorsee; nor can an indorser against the suit of the indorsee of

his indorsee. But a maker sued by the payee, or an indorser by his indorsee, or, in general, any promisor sued by the party to whom he directly promises, may make this defence.

We shall find both the reason of this rule and the limitation of it in the nature and purpose of negotiable paper. It is intended to represent money; and the rules of law are intended to make this representation accurate and adequate. A, then, holding a note against B, indorses it to C in some business transaction, as money. C can judge for himself of B's ability to pay, and of A's, and accepts the note. Whether A paid anything to B for it, or whether B had any consideration whatever, or whether if there were a consideration it has or has not failed, C knows not. Perhaps he could ascertain this by sufficient inquiry; but the inquiry would require much time and labor, and could not be made in every case in which negotiable paper is used in business, without inconvenience so great as very seriously to diminish the employment and the usefulness of such paper. The law, therefore, takes care of this for him. If C receives the note in good faith, B cannot interpose the objection of want or failure of consideration. The presumption is absolute as to him; and so it is in favor of any party against any other party, excepting him from whom he, in reference to whom the question is raised, immediately received it.

In the case before supposed, C stands in a different relation to A from what he does to B. Whether any consideration passed between A and B, he cannot be supposed to know, and the law infers or rather supplies it for him. But whether any passed between himself and A, he must be supposed to know, and therefore, while the law presumes this *prima facie*, as a proper protection to negotiable paper, it permits the defendant to rebut the presumption by evidence.

In a few of the earlier cases, attempts were made to place negotiable paper on the same footing with instruments under seal, even as between the original parties; (*q*) especially if it appeared that the paper was intended as a gift to the payee. (*r*) But it is

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(*q*) See *dicta* in *Pillans v. Van Mirop*, 3 Burr. 1663.

(*r*) Thus, in *Livingston v. Hastie*, 2 Caines, 246, *Livingston, J.* said: "Whether the mere want of consideration, even between the original parties, can be alleged against a promissory note, or a bill of exchange, may well be doubted. It is not necessary, as in other simple contracts, to state a consideration in the declaration; the instrument itself

now well settled, that, in an action against a party to a bill or note by his immediate promisee, a want or failure of consideration furnishes the same defence as in the case of any other parol

imports one, and in this respect partakes of the quality of a specialty. Nor is the plaintiff bound to prove his giving any value for such paper, unless when he sues as bearer of a bill transferable by delivery, and that under suspicious circumstances. *Grant v. Vaughan*, 3 Burr. 1516. No case can be found where the want of consideration alone has been admitted as a good defence. As against the payee, the maker, it is true, has been permitted to show, not a want, but a failure, of consideration, and in all cases he may insist on the illegality of it. Chitty says, that the want of consideration may be relied on, but not one of the decisions which he cites will bear him out. In *Jefferies v. Austin*, 1 Str. 674, the defendant was only permitted to show the note was delivered in the nature of an escrow, and it appearing that the condition on which it was to take effect had not been performed, a verdict was found for him. Here, the consideration which had induced the defendant to make the note failed, but if he had given it to the plaintiff voluntarily, as a gift, and without receiving any value, this would hardly have been a good defence." In *Bowers v. Hurd*, 10 Mass. 427, a woman possessed of a sum of money and desirous of leaving a legacy to a friend to whom she thought herself under obligation, and desirous also to avoid the expense attending a will, made a promissory note payable to that friend, which she placed in the hands of a third person to be by him delivered over to the promisee after her decease. She recognized the transaction in her last sickness, and put into the hands of a person about her, personal securities for the payment of her debts and funeral charges, and especially this promissory note. It was held, that the promisee was legally entitled to the contents of the note, in an action against the administrator of the promisor, her estate being solvent. *Parker, J.* said: "We do not admit that, when one voluntarily makes a written promise to another to pay a sum of money, the promise can be avoided merely by proving there was no legal and valuable consideration subsisting at the time; any more than, if he actually paid over the amount of such note, he can recover it back again, because he repents of his generosity. He has, indeed, precluded himself and his representatives from denying a consideration, when he has under his hand acknowledged one. That consideration may not have been of a nature to support an *indebitatus assumpsit* upon an implied promise; but may, nevertheless, have been a just and adequate foundation of his promise; and as the circumstances of the transaction may be wholly unknown to any but the immediate parties, there is no reason for permitting an executor or administrator to dispute what the deceased never questioned in his lifetime, and never intended should be questioned after his death. We are satisfied that none of the decisions respecting the avoidance of notes or other written promises, for want of consideration, are impeached by our decision in this case. A careful examination will discover, that in all those cases the ground taken in defence is, not that there was originally no consideration, contrary to the express admission of the promisor, but that the consideration had failed, or that it rested in mistake or misapprehension; what the parties supposed to be a consideration turning out in fact to be none. It was on this principle that the case of *Boutell v. Cowdin*, 9 Mass. 254, was decided. In those cases the promisor is always permitted, against the party with whom he contracted, to show the mistake or the failure of what was supposed to be substantial. This does not contradict his own acknowledgment of value received, but sets up an equitable claim of discharge, upon the ground that both parties were deceived in the contract. Fraud, illegality, and imposition are also proper defences against actions to enforce such promises, depending upon other principles." And see

contract.(s) And if A makes a note in favor of B, and delivers it to B without consideration, intending it as a gift, and afterwards takes it up and gives a new note instead, this renewed note is without consideration.(t) So also it is well settled that the

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Tate v. Hilbert, 2 Ves. Jr. 111; Seton v. Seton, 2 Bro. Ch. 610; Per Parke, B. in Easton v. Pratchett, 1 Crompt. M. & R. 800, and Milnes v. Dawson, 5 Exch. 948. But see next note.

(s) Thus, in Holliday v. Atkinson, 5 B. & C. 501, where a promissory note, expressed to be for value received, was made in favor of an infant aged nine years, and in an action upon the note by the payee against the executors of the maker, no evidence of consideration being given, the learned judge told the jury that the note, being for value received, imported that a good consideration existed, and that gratitude to the infant's father, or affection to the child, would suffice. Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient; and a new trial was granted. In Easton v. Pratchett, 1 Crompt. M. & R. 798, 2 Crompt. M. & R. 542, to a declaration on a bill of exchange by indorsee against indorser, the defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement; and that he, the defendant, had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement. Held, after verdict, that the plea was sufficient. In Pearson v. Pearson, 7 Johns. 26, which was an action by the payee against the maker of a promissory note, the court said: "The validity of the note cannot be supported upon the ground taken at the trial, of its being a gift; for a gift is not consummate and perfect until a delivery of the thing promised; and until then the party may revoke his promise. A parol promise to pay money, as a gift, is no more a ground of action than a promise to deliver a chattel, as a gift. It is the delivery which makes the gift valid. *Donatio perficitur possessione accipientis*. Noble v. Smith, 2 Johns. 52. The question then was upon the delivery and consideration of the note; for if there was no consideration for the note, it was a *nude pact*, and void as between the original parties to it." In Fink v. Cox, 18 Johns. 145, a father, from affection merely, gave to his son a promissory note for one thousand dollars, payable to him or order, sixty days after date. In an action of assumpsit brought by the son against the executor of his father, to recover the amount of the note, it was held, that the action could not be maintained, for it was not a *donatio causa mortis*, nor a valid gift of so much money, but a mere promise to give; and blood or natural affection is not a sufficient consideration to support a simple executory contract. And see Schoonmaker v. Roosa, 17 Johns. 301; Slade v. Halsted, 7 Cowen, 322. In Parish v. Stone, 14 Pick. 198, it was held, that a promissory note, made upon no other consideration than that of equalizing the distribution of the promisor's estate after his decease, was without a sufficient legal consideration, and therefore could not support an action or found a legal claim. In Clement v. Reppard, 15 Penn. State, 111, it was held, that the consideration of a promissory note not under seal, given for a balance on work done, may be inquired into in a suit between the original parties, even though the maker, at the time it was given, expressed himself satisfied with it, there being no evidence that, at the time of the settlement or giving of the note, any new consideration passed from the payee to the maker. And see Barnet v. Offerman, 7 Watts, 130; Barnum v. Barnum, 9 Conn. 242; Klein v. Keyes, 17 Misso. 326; Haynes v. Thom, 8 Fost. 386.

(t) Thus, in Copp v. Sawyer, 6 N. H. 386, it was held, that where a promissory note

donor's own promissory note, or an unaccepted bill of exchange drawn by the donor, cannot be the subject of a *donatio causa mortis*.(u) But the note of a third person is a proper subject of such gift, even without indorsement, and the donee may maintain an action in the name of the executor or administrator of the donor without his consent.(v)

It is sometimes an important question, and one not always free from difficulty, particularly in the case of bills of exchange, whether the plaintiff in an action is the immediate promisee of the defendant, within the meaning of the rule, or whether he is to be regarded as a remote party. The drawer of a bill of exchange is the immediate promisee of the acceptor; therefore, if the acceptance was without consideration, the drawer cannot recover against the acceptor. But it is otherwise of the payee; he is regarded as a stranger to the acceptor, in respect to the con-

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is made as a gift, and intended as a legacy, no suit can be sustained upon it, in favor of the payee, against the executor or estate of the maker; and where such note is executed and delivered as a gift, and afterwards taken up by the maker, and a new note given for a larger amount in lieu of it, the latter being likewise intended as a gift, the giving up of the first furnishes no consideration upon which the latter can be sustained, for any part of the amount. In *Hill v. Buckminster*, 5 Pick. 391, it was *held*, that a promissory note, expressed to be for value received, may be avoided, as between the payee and the maker, by proving that there was no consideration for it originally; and a note given in renewal of one so voidable is likewise without consideration. *Parker*, C. J. said: "In coming to this conclusion, we undoubtedly overrule some of the expressions in the opinion as reported in the case of *Bowers v. Hurd*, 10 Mass. 427, though the case itself was rightly decided upon other principles. It is in that opinion stated that to a promissory note, in which value is acknowledged to have been received, it cannot be objected in defence, between the original parties, that there was no existing consideration when the promise was made, though it would be competent to show that the consideration had failed or that it was illegal. But further opportunity to examine the cases has convinced us that the opinion so expressed is untenable; there being cases in the English and other books, which are cases clearly of defence founded upon no consideration, rather than a failure of one once existing. This, though contrary to the usual principle of holding a party to his acknowledgment, must be considered as the law, and we cannot depart from it, however disingenuous such defences generally appear to be." And see *Geiger v. Cook*, 3 Watts & S. 266. In *Dawson v. Kearton*, 3 Smale & G. 186, a different opinion is intimated.

(u) *Harris v. Clark*, 2 Barb. 94, 3 Comst. 93 (overruling *Wright v. Wright*, 1 Cowen, 598); *Parish v. Stone*, 14 Pick. 198; *Smith v. Kittridge*, 21 Vt. 238; *Raymond v. Sellick*, 10 Conn. 480; *Holly v. Adams*, 16 Vt. 206; *Craig v. Craig*, 3 Barb. Ch. 76; *Flint v. Pattee*, 33 N. H. 520. See *contra*, *Jones v. Deyer*, 16 Ala. 221; *Contant v. Schuyler*, 1 Paige, 316; *Bowers v. Hurd*, 10 Mass. 427; *Woodbridge v. Spooner*, 1 Chitty, 661; *Seton v. Seton*, 2 Bro. Ch. 610; *Wells v. Tucker*, 3 Binn. 366.

(v) *Bates v. Kempton*, 7 Gray, 382.

sideration for the acceptance. Consequently, if the acceptance is absolute in its terms, and the bill is received by the payee in good faith and for value, it is no answer to an action by him, that the defendant received no consideration for his acceptance, or that the consideration therefor has failed. And it is immaterial for this purpose, whether the bill is accepted while in the hands of the drawer, and at his request, or has passed into the hands of the payee before acceptance, and is accepted at his request.<sup>(w)</sup>

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<sup>(w)</sup> *Robinson v. Reynolds*, 2 Q. B. 196. In assumpsit by indorsee of a bill of exchange against acceptors, defendants pleaded that K., the drawer, was in the habit of delivering goods to C. to be carried by him to Liverpool, consigned and deliverable there to K.'s order, and on so doing, of receiving from C. a receipt for the goods, bill of lading, or document, which, by the custom of merchants, when indorsed for value, passed the property in the goods, and entitled the indorsee to have them delivered to him. That K. used to obtain advances from plaintiff on indorsing to plaintiff such document, and drawing and delivering to him a bill of exchange on defendants (who traded at Liverpool as purchasers and commission agents of such goods as K. delivered to C.), if the goods were deliverable to defendants, or on some other person to whom they were deliverable. That plaintiff used to forward the indorsed document to Liverpool, and to have it presented to defendants (or such other person), and, on the faith thereof, and at plaintiff's request, and in consideration of such security on the goods, defendants (or such other person) used to accept the bill of exchange; of all which plaintiff had notice. That K., pretending to act in pursuance of such usage, fraudulently indorsed and delivered to plaintiff a document in the usual form, to which C.'s signature was forged, pretending that it was genuine, and that the goods mentioned in it had been delivered to C., which was false; and K., at the same time, indorsed the bill of exchange to plaintiff, who advanced K. the amount on the faith of the document. That plaintiff indorsed the document, and had it presented to defendants, with the bill of exchange, and requested them to accept the bill of exchange on the faith of, and in consideration of the delivery of, the document, and delivered the document to them as a true one. That defendants, in consideration of the goods mentioned in the document, and confiding and relying on, and in consideration and on the faith of, the document, and, in ignorance of its being forged, accepted the bill of exchange for and at the request of plaintiff. That so the consideration for the acceptance, which defendants had been induced to make under the mistake into which they had been led by the said conduct and indorsement of plaintiff, wholly failed; and that there never was any other consideration for the acceptance. The plea did not allege that plaintiff knew the document to be forged, or represented it to be genuine. *Held*, by the Court of Queen's Bench, on motion for judgment *non obstante veredicto*, to be a bad plea. Judgment of the Queen's Bench affirmed in the Exchequer Chamber. *Tindal*, C. J., in delivering the judgment of the court in the Exchequer Chamber, said: "The sole ground on which the defendant relies is, that the acceptance was not binding on account of the total failure or insufficiency of the consideration for which it was given, the document, on the delivery of which the acceptance was given, having been forged, and there never having been any other consideration whatsoever for the acceptance of the defendants. And this would have been a good answer to the action, if the bank had been the drawers of the bill. But the bank are indorsees, and indorsees for value; and the failure or want of consideration between them and the acceptors constitutes no defence; nor



It would seem, also, that the question is not always conclusively determined by the form of the instrument. For, although it should appear, on the face of the bill sued on, that the plaintiff was the immediate promisee of the defendant, the plaintiff may show that he was not so in fact; but that the bill came to him through other hands. Thus, the payee is in general the immediate promisee of the drawer; and, in an action by the former against the latter, a want or failure of consideration for drawing the bill is a good defence. But if A, in New York, being indebted to B, in London, procures C, in New York, to draw a bill on London in favor of B, and remits the same to B in payment of his debt, the liability of C to B will be absolute, whether C received any consideration from A or not. For the transaction is the same in substance, as if the bill had been drawn in favor of A, and by him indorsed to B; and in that case, in an action by B against C, there could of course be no inquiry into the consideration between C and A.(x) But if A were the mere agent

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would the want of consideration between the drawer and acceptors (which must be considered as included in the general averment that there was no consideration), unless they took the bill with notice of the want of consideration, which is not averred in this plea. Admitting that the bill was accepted by the drawee at the request of the bank, and on a consideration which turns out to be utterly worthless, the case is the same as if the bill had been accepted without any value at all being given by the bank to the defendants; and, on that supposition, the defendants would still be liable as acceptors to the bank, who are indorsees for value, unless not only such want of consideration existed between the drawer and acceptors, but unless the indorsees had notice or knowledge thereof. For the acceptance binds the defendants conclusively, as between them and every *bona fide* indorsee for value. And it matters not whether the bill was accepted before or after such an indorsement. Consistently with every averment in the plea, the bill may have been accepted on the credit of the drawer, or for his accommodation; and the plaintiff would then unquestionably have a right to sue, having given full value for it." The plaintiff is spoken of in this case as an indorsee. The bill was in fact drawn to the order of the drawer, and by him indorsed to the plaintiff. The plaintiff, therefore, was substantially the payee. Besides, an indorsee, who takes a bill before it is accepted, is as much an immediate party to the acceptance as the payee.

(x) *Munroe v. Bordier*, 8 C. B. 862. In this case it was *held*, that where the purchaser or remitter in London of a foreign bill gets from the drawer, according to the usage in London, credit until the next foreign post-day for the amount, and delivers the bill to the payee, who receives it *bona fide* and for value, the drawer is liable for the amount to the payee, although, in consequence of the purchaser or remitter's failure before the next foreign post-day, the drawer never receives value for it. The declaration stated that A (the defendant) made a bill of exchange, and directed it to B, a merchant in France, requiring him to pay the amount to the order of C (the plaintiff); that A delivered the bill to D, who delivered it to C; and that B refused payment, &c. A pleaded that he made and delivered the bill to D for the use of C, on the faith and



of B, any defence which would be good against him would also be good against B.(y) If a note, payable to B, is indorsed by

terms of being paid the price and value thereof according to the usage of merchants in that behalf, that is to say, on the next foreign post-day; that neither C nor any other person, then or at any time before or since, paid him the said price or value of the bill, or any part thereof; that he never had any value or consideration for the making or delivery of the bill; and that C always held and still held the same without any value or consideration whatever to him (A) for the same. Replication, that, after the making of the bill and before it became due, D, who appeared to be, and whom C believed to be, the lawful holder, delivered the bill to him for a good and valuable consideration, and without notice of the premises in the plea mentioned. *Held*, that the plea was no answer to the action; and that, even if it were sufficient to call upon C to show *bona fides*, he did so by his replication. *Wilde, C. J.* said: "The writers upon foreign bills contemplate the existence of four parties, — the giver of value, or purchaser of the bill, or remitter, as he is often called, — the drawer, — the party to whom the bill is to be paid abroad, — and the drawee. The ordinary course of dealing with reference to foreign bills, as described by them, begins by the sale of the bill by the drawer to some person other than the payee; it, therefore, does not contemplate that the consideration for the bill should necessarily move from the payee to the drawer, or that no person but the drawer should have a right to confer a title to the bill upon the payee. See Beaves's *Lex Mercatoria*, Bills of Exchange, par. 6, p. 416 (452), citing Marius, p. 22. And in par. 14, p. 418 (453), he says: 'In case of a remitter's failing before he has paid the value, and the person on whom the bill is drawn gets advice of this occurrence before acceptance, and therefore refuses to accept it, the bill, on its returning protested, shall be paid, notwithstanding, with all charges, by the drawer, under proof by the possessor that he negotiated the said bill, and paid a just value for it.' According to that rule, the plaintiffs would in this case be entitled to recover; for the plea does not deny that they gave a just value for the bill. Again, in par. 15, Beaves states the law to be, that where the drawer gives credit to the remitter, without advising his principal thereof, if the remitter does not pay the money, the drawer shall suffer the loss. Here, it is not shown by the plea, that the bill was handed to the plaintiffs before the next post-day, — and, for the reasons above given, it seems to be immaterial whether it was handed over before or after that day, — nor that the drawers ever gave notice to the payees that the price had not been duly paid. They may, therefore, be considered to have given credit to the remitter. It appears to us, then, that, on this declaration and plea, it must be taken that Coates & Co. were the purchasers of the bill in question; and that the drawers placed it in their hands with a controlling power over it, giving them credit for a certain time for the purchase-money; and that they delivered it to the payees, who received it *bona fide* and for value; for no fraud is alleged, and value as between Coates & Co. and the plaintiffs is not denied. Under such circumstances, we are of opinion that the plaintiffs acquired a good title to the bill, and may sue the drawers upon it, although they have never received value for it. Suppose the bill had been given to Coates & Co. for their accommodation, or a promissory note had been given to them, made payable to the plaintiffs, in order that they, Coates & Co., might borrow money upon it, or hand it over to the payees in discharge of a debt, surely the payees, in either case, might sue upon the instrument, without proving the giving of value to the drawer or maker. The want of such value could not be relied upon as an answer to the action, on the ground of the contract between the immediate parties to the instrument being *nudum pactum*."

(y) *Puget de Bras v. Forbes*, 1 Esp. 117. The plaintiff in this case was a foreigner,

him in blank and delivered to C, and after passing through several hands comes into the possession of D, who receives it in good faith and for a valuable consideration, and fills up the blank indorsement directly to himself, and brings an action against the maker; it is no answer to this action to say, that the note was made and delivered to B without consideration, and by him indorsed without consideration. For although D appears on the face of the note to be the immediate indorsee of B, and deduces his title as such, he is not so in fact.(z) So if A, for a valuable consideration moving from C to him, should procure B to make his note in favor of C, it should seem that it would be no answer to an action by C against B, that the latter received no consideration for making the note.(a) So if A, for a good consideration moving from B to him, authorizes B to draw upon C to a certain amount, on A's account, and B draws accordingly, and C accepts, C will be as absolutely bound by his acceptance to B, the drawer, as to any subsequent *bona fide* holder for value.(b)

A defendant may, in general, make the defence of a want of consideration against a remote party, if he could have made it against a nearer party, and the remote party took the paper from the nearer party with a knowledge that it was open to this defence. But a very important exception to this rule prevails in the case of accommodation paper.(c) The plain reason of this

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residing in Holland; and, having a large sum of money in England in the funds, employed the house of Agassiz, Rougemont, & Co. as his agents, to sell it out, and to remit it to him in bills on Holland. Agassiz, Rougemont, & Co. applied to the defendants for the purpose, and, on the seventeenth of February, 1792, got from them bills on Holland, in favor of the plaintiff. It was proved to be the custom of London, for persons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the money for them until the next post-day. In this case the next post-day was Tuesday, the twenty-first. On Monday, the twentieth, the house of Agassiz, Rougemont, & Co stopped payment, so that the defendants in fact had never received any value for the bills which they had so drawn on Holland in favor of the plaintiff; and they having ordered their correspondent abroad not to pay the bills when due, this action was brought against them as drawers of the bill. *Held*, that the defendants were not liable. But see, as to this case, *Poirier v. Morris*, 2 Ellis & B. 89.

(z) *Arbouin v. Anderson*, 1 Q. B. 498.

(a) See per *Wilde*, C. J., in *Munroe v. Bordier*, *supra*, p. 181, note x; *Horn v. Fuller*, 6 N. H. 511; *Glascock v. Rand*, 14 Misso. 550. But see *Rogers v. Morton*, 12 Wend. 484, 14 Wend. 575; *Nelson v. Cowing*, 6 Hill, 336.

(b) See *Pillans v. Van Mierop*, 3 Burr. 1663.

(c) In *Smith v. Knox*, 3 Esp. 46, Lord *Eldon* said: "If a person gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill;

is, that the accommodation maker, acceptor, or indorser intends to lend his credit, and does it as a favor to some party who pays him nothing. This party, therefore, can never sue him, or if he does, the want of consideration will be a perfect defence. But if this accommodated party uses the credit he has borrowed by selling the note or getting it discounted, the holder may say, "I bought the note or discounted it for the very reason that I knew you had lent your credit on it, and I took it on the faith of your credit." We must, therefore, understand the legal definition of an accommodation party to negotiable paper to be one who puts his name there without any consideration, with the intention of lending his credit to the accommodated party. It seems that a note intended by the maker as a gift to the payee would be governed by the same principles as an accommodation note. The maker, as we have seen, would have a defence as against the payee; but he would have none, we think, as against a subsequent holder for a valuable consideration, though such holder received the note with knowledge of the circumstances under which it was given.

The possession of a negotiable note is *prima facie* evidence of the right of the holder, and also of the fact that the holder gave value for it.<sup>(d)</sup> This latter question is often very important. The opinion seems to have prevailed at one time, that in an action by an indorsee against a maker or against a remote indorser, if the defendant could show that for any cause the action could

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as, for example, if to answer a particular demand, then the party taking the bill cannot apply it to a different purpose; but where a bill is given under no such restriction, but given merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action brought on that bill, that the defendant, the acceptor, accepted it for the accommodation of the drawer, and that that fact was known to the holder; in such case the holder, if he gave a *bona fide* consideration for it, is entitled to recover the amount, though he had full knowledge of the transaction." So in *Brown v. Mott*, 7 Johns. 361, where a note was indorsed for the accommodation of the maker, and without consideration, it was *held*, that the indorser was liable for the amount, after due notice of non-payment, though the plaintiff knew at the time he took the note that the indorser had received no consideration; but if there is fraud in the case, and that known to the plaintiff, the indorser may show it in defence. So in *Grant v. Ellicott*, 7 Wend. 227, it was *held*, that it is no defence in an action on a bill of exchange by the payee against the acceptor, that the bill was accepted without consideration, or, in other words, was an accommodation acceptance, and that fact known to the payee.

(d) *McCaskill v. Ballard*, 8 Rich. 470; *King v. Milsom*, 2 Camp 5; *Collins v. Martin*, 1 B. & P. 648; *Minell v. Reed*, 26 Ala. 730. And see the next note

not have been maintained by the plaintiff's immediate indorser, this would throw upon the plaintiff the burden of proving that he received the note for a valuable consideration.<sup>(e)</sup> But latterly a distinction has been taken ; and it is now held that mere proof

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(e) *Heath v. Sansom*, 2 B. & Ad. 291. In this case S., being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees indorsed it over, and the indorsee sued the parties who appeared to be makers. *Held*, that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees, and that, at least under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value. *Held* also, *Parke, J.* dissenting, that in all cases where, from defect of consideration, the original payees cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee. Lord *Tenterden* said : " The question is, whether, in order to succeed in this action against the defendant Evans, the plaintiff was bound, under the circumstances of the case, to prove a consideration for the indorsement. According to the more recent practice, I think it was incumbent on him to do so ; and this is a stronger case than the ordinary one, in which indorsees have been put to prove value given by reason of the circumstances under which an acceptance or note was obtained, because here the indorsee chooses to bring his action against makers, who are unknown to him, rather than sue the indorsers, whom he knows, and from whom he took the note." *Littledale, J.* : " It has been frequently held, that where a note or acceptance of a bill has been obtained by fraud, loss out of the owner's hands, or duress, the indorsee is bound to show that he gave value, and in some instances even that he became holder *bona fide*, and not under circumstances of suspicion. It may be laid down as a general rule, that if the note or acceptance were taken under such circumstances that the indorser himself could not recover, the indorsee must prove that he became so for a good consideration, though no notice be given him to produce such evidence. There is no more hardship in the necessity of proving consideration here than in ordinary actions on simple contract, where the plaintiff must be prepared to show a consideration if necessary, though in the great majority of instances no such necessity arises. It may be said, that the rule now laid down is inconvenient, as restraining the negotiability of notes and bills ; but this is fully counterbalanced by the inconvenience which would arise on the other hand, if a party who could not himself sue on a note or acceptance could put it into the hands of a third person, and, in consequence of such transfer, the proof of value given should be dispensed with. The present case is stronger than the ordinary one, of a bill accepted for accommodation, because here some little suspicion arises from the note being indorsed over by the Droitwich Company, and the action then brought against the maker." *Parke, J.* : " I am of the same opinion on the special circumstances of this case ; but I have always understood that an indorsement must be taken, *prima facie*, to have been given for value, and that the proof, at least of circumstances tending to throw suspicion on such indorsement, lies on the party disputing its validity before the indorsee can be called upon to prove that he gave value for the bill. This doctrine appears to me to be correctly laid down by *Eyre, C. J.*, in *Collins v. Martin*, 1 B. & P. 648. When the note or acceptance has been obtained by felony, by fraud, or by duress, it has been usual to require proof of valuable consideration on the part of the indorsee ; and I do not dispute the propriety of that usage, as any one of those facts raises some suspicion of the title of the holder. But I am by no means satisfied that the same rule

that there was no consideration for the note between the original parties, as that it was an accommodation note, or was intended as a gift, or was given for a supposed balance due to the payee when in fact there was no such balance due, or was given for what the parties erroneously supposed to be a sufficient consideration, will not make a *prima facie* case for the defendant.(f)

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can be applied to all cases where an acceptance or note has been given without consideration. I think this is a very important question. It is difficult to reconcile the recent practice (for it is only recent) with principle ; for the simple fact of want of consideration between the acceptor and drawer, or maker and payee, affords no inference that the holder received the bill or note *mala fide*, or without consideration. It is, besides, a practice likely to produce great increase of expense, as, in every instance, a plaintiff, who is indorsee, can hardly be safe, without being prepared to prove, as to some one at least of the indorsements, that value was given for it ; and this inconvenience may outweigh that of casting upon the defendant the burden of making out a case of suspicion against the indorsee, before proof or consideration can be required from him." *Patterson, J.* : " As at present advised, I think the general rule of practice on this subject has been correctly stated, and that, where a note or acceptance has been given under such circumstances that the original payee could not recover on it, the indorsee may fairly be called upon to show how it came to his hands, and is not entitled to a previous notice. And, therefore, independently of the circumstances of suspicion in this case, I should think, upon the point of practice alone, this rule ought to be made absolute." Prior to this decision, the rule was very uncertain. See *Paterson v. Hardacre*, 4 Taunt. 114 ; *Duncan v. Scott*, 1 Camp. 100 ; *Rees v. Marquis of Headfort*, 2 Camp. 574 ; *Reynolds v. Chettle*, 2 Camp. 596 ; *Lawson v. Weston*, 4 Esp. 56 ; *Thomas v. Newton*, 2 C. & P. 606 ; *Delauney v. Mitchell*, 1 Stark. 439 ; *Bassett v. Dodgin*, 10 Bing. 40 ; *Mann v. Lent*, *Moody & M.* 240, 10 B. & C. 877 ; *Humbert v. Ruding*, *Chitty on Bills*, 9th ed., 651 ; *Spooner v. Gardiner*, *Ryan & M.* 84 ; *Browne v. Murray*, *Ryan & M.* 254. And see the Reporter's note to this case. In the later case of *Simpson v. Clarke*, 2 Crompt. M. & R. 342, the question was much considered, and the court were strongly inclined to agree with the opinion of the majority of the judges in *Heath v. Sansom*.

(f) This rule was first laid down by *Purke, J.*, in *Heath v. Sansom*, *supra*. In *Whittaker v. Edmunds*, 1 *Moody & R.* 366, in an action by the third indorsee against the acceptor of a bill of exchange, it was ruled at Nisi Prius that the mere absence of consideration for the acceptance and prior indorsements did not throw the onus upon the plaintiff of proving the consideration of the indorsement to him, where no circumstances of fraud or illegality appeared. *Patterson, J.* said : " I am of opinion that the evidence proposed to be offered by the defendant will not make it necessary for the plaintiff to prove the consideration which he gave for the bill. Since the decision of *Heath v. Sansom*, the consideration of the judges has been a good deal called to the subject ; and the prevalent opinion amongst them is, that the courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument, that throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it. So far I accede to the case of *Heath v. Sansom* ; for there were in that case circumstances raising a suspicion of fraud ; but if I added, on that occasion, that, even independently of these circumstances of suspicion, the holder

The law will still presume that the plaintiff received the note for value. The same rule prevails when the note was given originally for a good consideration, but which has since totally or par-

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would have been bound to show the consideration which he gave for the bill merely because there was an absence of consideration as between the previous parties to the bill, I am now decidedly of opinion that such a doctrine was incorrect." In *Mills v. Barber*, 1 M. & W. 425, which was assumpsit by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that he accepted the bill for the accommodation of the drawer, and that the drawer did not give, nor did the defendant receive, any consideration for his accepting or paying the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration. Replication, that the drawer indorsed the bill to the plaintiff for a good and valuable consideration. *Held*, that it was not incumbent on the plaintiff to begin and prove, in the first instance, that he gave value for the bill; but that the rule is otherwise, where the title of the holder is impeached on the ground of fraud, duress, or that the bill has been lost or stolen. Lord Abinger said: "No doubt the rule of law is, that where a plaintiff has not given consideration for a bill of exchange, for which no consideration has been previously obtained, he cannot recover upon it. But the doubt is as to which party is required to give evidence. Cases were cited to show the practice to have been for the plaintiff to prove consideration given by him. I must own, that, as far as my experience has gone, that was the course. I never have known the point mooted except in certain cases. A practice had grown up of giving a notice to the plaintiff calling upon him to prove consideration, and it was a very general course, where such a notice had been given, for the plaintiff to do so in the first instance. But I have known cases where the plaintiff has refused at first, and then, the defendant having proved that the bill was an accommodation bill, the plaintiff has in reply given proof of his being a holder for value. The judges have taken this question into consideration, it having become much more important to settle it, than the particular manner in which it should be settled. The Court of King's Bench has been consulted; and *Littledale, J.* and *Patteson, J.* have withdrawn the opinions which they expressed in the case of *Heath v. Sansom*. In *Simpson v. Clarke*, undoubtedly, I stated what I now state, that the practice was for the holder to prove that he gave value for the bill. I cannot say that I have departed from that opinion without some consideration of the public convenience. In *Simpson v. Clarke*, I expressly stated that I did not decide the case upon this point, and I said it was not intended to determine the question. It is impossible to read my judgment in that case without perceiving that I abstained from deciding it. I think I made a distinction between bills given for accommodation only, and cases of fraud. There is, indeed, a substantial distinction between them, inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill is no evidence of the want of consideration in the holder. If the defendant says, I lent my name to the drawer for the purpose of his raising money upon the bill, the probability is, that money was obtained upon the bill. Unless, therefore, the bill be connected with some fraud, and a suspicion of a fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen, in which cases the holder must show that he gave value for it, the *onus probandi* is cast upon the defendant. The decision of the present case requires only to lay down this rule, that,



tially failed.(g) But if the defendant can show that the note was originally obtained by fraud or duress, or has been fraudulently obtained from an intermediate holder, or has been lost or stolen, or has been in any way the subject of fraud or felony, this will throw the burden of proof upon the plaintiff.(h) In such

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where there is no fraud, nor any suspicion of fraud, but the simple fact is, that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill. That seems to be the opinion generally prevailing among the judges. In this case the *onus probandi* lay on the defendant, and he ought to have gone further." See, to the same effect, *Percival v. Frampton*, 2 Crompt. M. & R. 180; *Low v. Chifney*, 1 Bing. N. C. 267; *Ellicott v. Martin*, 6 Md. 509; *Morton v. Rogers*, 14 Wend. 575; *Knight v. Pugh*, 4 Watts & S. 445; *Fletcher v. Gushee*, 32 Maine, 587; *Ross v. Bedell*, 5 Duer, 462. In this last case, *Sergeant, J.* said: "In cases other than those of negotiable notes obtained or put in circulation by fraud or undue means, the maker, by its negotiable character, agrees that the payee shall put it in circulation. He has no right, therefore, to complain of his own act; and a holder, placing confidence in such paper, ought not to be compelled to prove consideration. In many cases it would be exceedingly difficult to do so, and to require it would throw a serious impediment in the way of the circulation of negotiable paper. It is otherwise where there is fraud, because there the maker gives no such authority. He is in the light of an unfortunate, rather than an imprudent man, and protection will be given to him so far as to require of the holder proof of a valuable consideration. The policy of the law is to encourage the circulation of negotiable paper, and only interferes to require extraordinary proof from the plaintiff in order to protect one who has been imposed upon in some way or other." But see *Marston v. Forward*, 5 Ala. 347; *Thompson v. Armstrong*, 7 Ala. 256; *Boyd v. McIvor*, 11 Ala. 822. In *Jacob v. Hungate*, 1 Moody & R. 445, it was *held*, that the fact of a bill having been accepted to raise money for the acceptor, and of the payee having appropriated the money so raised to his own use, is not sufficient to call upon a subsequent indorsee to show that he gave value for the bill. But see this case explained in *Smith v. Braine*, 16 Q. B. 253.

(g) *Knight v. Pugh*, 4 Watts & S. 445; *Wilson v. Lazier*, 11 Grat. 477.

(h) In *Bailey v. Bidwell*, 13 M. & W. 73, it was *held*, that where, in an action on a bill of exchange or promissory note, the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, to which the plaintiff replies *de injuria*, the illegality being proved, the onus is cast upon the plaintiff of proving that he gave value. The same doctrine is declared in *Smith v. Braine*, 16 Q. B. 244, overruling *Brown v. Philpot*, 2 Moody & R. 285. In *Harvey v. Towers*, 6 Exch. 656, in an action by indorsee against acceptor of a bill of exchange, to which the defendant pleaded that the bill was obtained by fraud, and that it was indorsed to the plaintiff without consideration, and the plaintiff replied *de injuria*; it was *held*, that, although the latter allegation was necessary to render the plea good, proof of the fraud cast on the plaintiff the onus of proving consideration. *Pollock, C. B.* said: "It is now settled, that if a bill be founded in illegality or fraud, or has been the subject of felony or fraud, upon that being proved the holder is compelled to show that he gave value for it. That was established in *Bailey v. Bidwell*, and subsequently, by the Court of Queen's Bench, in *Smith v. Braine*, in a considered judgment." *Platt, B.*: "Bailey v. Bidwell and Smith v. Braine were the decisions of eight judges, that, if a bill be once infected with fraud or illegality, the consideration becomes a subject-matter

cases the presumption is, that he who has been guilty will part with the note for the purpose of enabling some third party to recover upon it for his benefit; and such presumption operates against the holder, and it devolves upon him to show that he gave value for it. So where the note was given for a distinctly illegal consideration.<sup>(i)</sup> But it has been recently held in England, that this rule will not apply to a note given in payment of a bet; for that a bet, though void, and therefore no consideration, is not illegal, so as to raise a presumption that the indorsement to the plaintiff was without value.<sup>(j)</sup>

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to be proved by the plaintiff. There is no hardship in such a rule, for the plaintiff must best know what consideration he gave for the bill; and besides, he claims under the party who committed the fraud." And see *Berry v. Alderman*, 14 C. B. 95; *Duncan v. Scott*, 1 Camp. 100; *Catlin v. Hansen*, 1 Duer, 309; *Aldrich v. Warren*, 16 Maine, 465; *Perrin v. Noyes*, 39 Maine, 384; *Munroe v. Cooper*, 5 Pick. 412; *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488; *Holme v. Karsper*, 5 Binn. 469; *Beltzhoover v. Blackstock*, 3 Watts, 20; *Vathir v. Zane*, 6 Grat. 246. But see *Russel v. Ball*, 2 Johns. 50; *McLemore v. Cannon*, 9 La. Ann. 22; *Matthews v. Poythress*, 4 Ga. 287, 305; *Nicholson v. Patton*, 13 La. 213; *Sandford v. Norton*, 14 Vt. 228; *Bertrand v. Barkman*, 8 Eng. Ark. 150; *Wallace v. Branch Bank*, 1 Ala. 565; *Hutchinson v. Boggs*, 28 Penn. State, 294; *McKesson v. Stanberry*, 3 Ohio State, 156. In New York, it is held that the holder of a note which has a fraudulent inception, or which is obtained from the payee by fraud, must prove that it was transferred to him for value and before maturity, but he is not bound to prove in addition, that at the time of the transfer he had no knowledge of the fraud, the burden of showing this being on the defendant. *Hart v. Potter*, 4 Duer, 458; *Ross v. Bedell*, 5 Duer, 462. But evidence of fraud is admissible, without an offer on the part of the defendant to prove notice to the plaintiff, it being sufficient to cast upon the holder the burden of proving that he gave a valuable consideration. *New York and Virginia, &c. Bank v. Gibson*, 5 Duer, 574; *Tucker v. Morrill*, 1 Allen, 528; *Sistermans v. Field*, 9 Gray. As to what is a fraud in this respect, see *Gray v. Bank of Kentucky*, 29 Penn. State, 365.

(i) See *Bailey v. Bidwell*, *supra*; *Edmunds v. Groves*, 2 M. & W. 300; *Rintam v. Stanley*, 2 Q. B. 117. But see *Wyatt v. Bulmer*, 2 Esp. 538.

(j) *Fitch v. Jones*, 5 Ellis & B. 238, 32 Eng. L. & E. 134, Lord Campbell said: "It is clear that, when there is illegality or fraud shown in a previous holder, a presumption that there is no consideration for the indorsements does arise; for the person who is guilty of illegality or fraud, and knows that he cannot sue himself, is likely to hand over the instrument to some other person to sue for him. It is not properly that the burden of proof as to there being consideration is shifted, but that the defendant, on whom the burden of proof that there was no consideration lies, has, by proving fraud or illegality in the former holder, raised a *prima facie* presumption that the plaintiff is agent for that holder, and has, therefore, unless that presumption be rebutted, proved that there was no consideration. But no such presumption arises where there was in the former holder a mere want of consideration, without any illegality or fraud. The question, therefore, comes to be, whether this note was given for a consideration merely equivalent to no consideration, or whether the note was given in an illegal transaction. I am of opinion that the note did not take its inception in illegality within the meaning



It is clear that an indorsee, without consideration, is subject to the same defences as his immediate indorser. For example, if a note is given for a patent right and the patent is declared void, the promisor can defend against the promisee, on the ground of failure of consideration. If the promisee indorsed it before maturity, for value, to a holder without notice or knowledge, this defence cannot be made. But if it be indorsed to the same indorsee, not for value, it may be made. The reason is this: If the transfer is made only as a pretence, and without actual change of property, but merely to enable the payee to get indirectly what he cannot get directly, then the indorsee is the mere agent or trustee of the payee, and the payee is still the real party in interest. If, however, it is made in perfect good faith, both parties believing the consideration sufficient and the note good, and intending that the note shall become by the transfer the property of the indorsee, it is then a gift, and nothing more.

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of the rule. The note was given to secure payment of a wagering contract, which, even before Stat. 8 & 9 Vict. c. 109, the law would not enforce: but it was not illegal; there is no penalty attached to such a wager; it is not in violation of any statute nor of the common law, but is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all. Though it is said, in *Atherfold v. Beard*, 2 T. R. 610, that a wager as to the amount of hop duty is contrary to public policy, it is not there meant that it was punishable, but merely that it was an idle wager on a matter in which the parties had no concern, and the discussion of which might prejudice others, like the wager on the sex of the Chevalier D'Eon (see *Da Costa v. Jones*, 2 Cowp. 729), and therefore was a wager not enforceable by law, though not a breach of any law. The note then being given, not on an illegal consideration, but merely on a void consideration, the presumption which the plaintiff would be called upon to rebut did not arise." *Erle, J.*: "It is clear that the general rule of law is, that when a party to a negotiable instrument pleads a plea excusing him from the fulfilment of the duty of paying according to the tenor of the instrument, the burden of proving the plea lies on him. It is also clear, that, when the plea alleges that the instrument had its inception in illegality or fraud, and that the plaintiff took it without value, proof that the instrument had its inception in illegality or fraud raises a presumption that the plaintiff took it without value; and so far shifts the burden of proof, that, unless the plaintiff gives satisfactory evidence that there was consideration for the instrument, the allegation in the plea that there was no consideration will be taken to be proved. The question in the present case is, whether this note was brought within the category of notes tainted with illegality within the meaning of the rule. I am of opinion that it was not. I think that the defendant might, without violating any law, make a wager. If he lost, he might, without violating any law, pay what he had lost, or give a note for the amount. I am of opinion, therefore, that the proof in this case had the same legal effect as if it had been proved that the defendant made Needham a present of this note. It is not as if the note had been given for an illegal consideration, or a fraudulent consideration, but the defendant is in the predicament of a person who voluntarily, as far as law is concerned, gives a negotiable instrument."

And a gift of negotiable paper, not being that use of the paper for which the law supposes it intended, is not such a negotiation of it as the law contemplates and protects.<sup>(k)</sup> And if the donee afterwards transfers it by indorsement for less than its value, or a wholly inadequate consideration, but in good faith, his indorsee can recover, we think, from a prior party, only what this indorsee paid for it.<sup>(l)</sup>

In relation to gifts of negotiable paper, generally, supposing them to be in good faith, they are so far valid that the donor cannot recover them back from the donee; neither can the donee recover on them against the donor; but he may recover against prior parties having no defence against the donor.<sup>(m)</sup> *A for-*

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<sup>(k)</sup> See cases *supra*.

<sup>(l)</sup> *Nash v. Brown*, Chitty on Bills, 74. In this case a bill of exchange was accepted by the defendant as a present to the payee, who indorsed it to the plaintiff for a small sum advanced by him. And Lord *Ellenborough* held, that the plaintiff was only entitled to recover so much as he had actually advanced on the bill. So in *Allaire v. Hartshorne*, 1 N. J. 665, it was *held*, that in an action on a note, which is invalid between the original parties for want of consideration, by a *bona fide* holder who has advanced only part of its value, such holder can only recover the amount which he has actually advanced. And see, to the same effect, *Chicopee Bank v. Chapin*, 8 Met. 40; *Youngs v. Lee*, 18 Barb. 187; *Simpson v. Clarke*, 2 Crompt. M. & R. 342; *Jones v. Hibbert*, 2 Stark. 304; *Wissen v. Roberts*, 1 Esp. 261; *Williams v. Smith*, 2 Hill, 301; *Petty v. Hannum*, 2 Humph. 102; *Holeman v. Hobson*, 8 Humph. 127; *Bethune v. McCrary*, 8 Ga. 114; *Brown v. Mott*, 7 Johns. 361.

<sup>(m)</sup> Thus, in *Milnes v. Dawson*, 5 Exch. 948, to an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, that the drawer indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held the same without value or consideration; and that, after the bill became due, the drawer accepted certain scrip certificates from the defendant, in full satisfaction and discharge of the bill. Replication, that the bill was indorsed for a good and sufficient consideration. Issue thereon. *Held*, after verdict, that the plea was bad, and that the plaintiff was entitled to judgment *non obstante veredicto*. *Parke*, B. said: "It would be altogether inconsistent with the negotiability of these instruments, to hold that, after the indorser has transferred the property in the instrument, he may, by receiving the amount of it, affect the right of his indorsee. When the property in the bill is passed, the right to sue upon the bill follows also. The question, whether Hanson could sue the plaintiff, we are not now called upon to determine. If it had been averred that the plaintiff held the bill as his agent, I should not have much difficulty in saying that the action would lie. A bill of exchange is a chattel, and the gift is complete by delivery coupled with the intention to give. If the question as to the rights between donor and donee were now discussed, with reference to the state of the law on the subject as it stood towards the close of the last century, we might hold otherwise than we now do. It has been said, that the donee of a bill of exchange cannot sue the donor upon it, as the donor may well allege that the donee did not give any consideration for it. See *Holliday v. Atkinson*, 5 B. & C. 501, and Mr. Chitty's work on Bills of Exchange, where the cases are to be found collected at p. 74. And, therefore, it may be said that,

*tiori*, an indorsee who has paid only a *partial* consideration may recover the whole amount of the note against all prior parties, who have no defence against his immediate indorser.(n)

. If the paper given be not negotiable, the donee may sue, but in the name of the donor. Then, if the donor attempted to defeat the suit by recalling his gift or denying his authority to sue, we think he would not be permitted to do so. And if the defendant interposed a set-off or other defence resting on equities which grew up between him and the donor after he had notice of the gift, we think that this would not be allowed. We rest both of these opinions on the general ground that the donor has effectually parted with his rights to the donee, although he has not laid himself under any enforceable obligation.

When the suit is between any immediate parties, the only consideration which comes into question is that which passed, or should have passed, between the plaintiff and defendant. But it is otherwise when the suit is brought against a party who is remote from the plaintiff. Here the defendant must begin his defence, by showing that no consideration was paid to him, or that it failed, or that he is an accommodation party. If he fails in this, he can go no further as to an inquiry into the consideration, because he certainly owes some one, and if the plaintiff is holder

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if this bill was a gift from Hanson, the plaintiff could not have sued him upon it; but still Hanson transferred all his rights to the plaintiff; and how, therefore, can it be contended that a payment to the donor is to be taken as a satisfaction of a bill in the hands of the donee? The learned counsel contends, that it is to be presumed that the indorsement took place after the bill had become due and payable. But we are not at liberty to draw any such inference; and it is perfectly consistent with everything that is stated in this plea, that the full title in the bill was transferred to the plaintiff. If the plea had alleged that the plaintiff held the bill as Hanson's agent, merely for the purpose of receiving the money for him, then a payment to either party would have been a good discharge of the party liable upon the bill, and the plea would have been good; but in truth the plea does not contain any such averment, and consequently it cannot be sustained." *Alderson, B.*: "I am of the same opinion. It is not necessary to say whether Hanson could maintain an action for the recovery of this amount from the plaintiff. But by the indorsement he has transferred to the plaintiff all the rights which, before the indorsement, he had of suing upon the bill. If, therefore, he has parted with all his rights, and that of suing on the bill, and the plaintiff has them, how is it possible to say, that a payment to Hanson, who has not the bill, is a due payment to the plaintiff, who has it?" And see *Easton v. Pratchett*, 1 Crompt. M. & R. 798, 2 Crompt. M. & R. 542.

(n) *Reid v. Furnival*, 5 C. & P. 499; *Johnson v. Kennion*, 2 Wilson, 262; *Tarbell v. Sturtevant*, 26 Vt. 513; *Moore v. Candell*, 11 Misso. 614; *Turner v. Brown*, 3 Smedes & M. 425.

of the note, it is of no consequence to the defendant what value or whether any value at all was given for it. But if he succeeds in this, one half, and no more, of his defence is made out. For now he must go on and show that the holder (if he took the note or bill before maturity) took it without consideration; because, if either of these considerations exist, the defendant is liable.<sup>(o)</sup> The case may be one, as we have seen, in which the defendant, after proving *his* want of consideration, may put the plaintiff to the proof of *his*; but the rule, that both considerations must fail, or, in other words, that either of them will sustain the plaintiff's case, still applies.<sup>(p)</sup>

Bills and notes almost always contain the words "value received," and it was formerly thought necessary to insert them, and that an instrument without them would not be a bill of exchange. But it has long been settled that they are immaterial. A consideration is equally presumed to exist, without them or with them.<sup>(q)</sup>

The words "value received" are ambiguous, where the bill is drawn payable to a third person; for they may mean value received by the drawer of the payee, or by the acceptor of the drawer. But the first is the more probable interpretation; for it is more natural "that the party who draws the bill should inform the drawee of a fact which he does not know, than of one of which he must be well aware."<sup>(r)</sup>

If, however, the bill is drawn payable to the drawer's own order, the words "value received" must mean received by the acceptor of the drawer; and on such a bill, if the declaration

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<sup>(o)</sup> *Bosanquet v. Corser*, 9 C. & P. 66, 8 M. & W. 142; *Bosanquet v. Forster*, 9 C. & P. 659.

<sup>(p)</sup> See cases *supra*, p. 188, note *h*.

<sup>(q)</sup> *White v. Ledwick*, 4 Doug. 247, Bayley on Bills, 2d Am. ed., p. 33, note 83. *Ashurst, J.* said: "The words 'value received' are only inserted *ex majori cautela*, in order that the payee may be able to recover upon it in an action for money lent, or money had and received, in case the instrument should be defective in other respects as a bill of exchange." But in *Townsend v. Derby*, 3 Met. 363, it was *held*, that a note, though it does not purport to be for value received, is admissible in evidence to support a count for money had and received of the payee by the maker. So in *Hatch v. Traves*, 11 A. & E. 702, it was *held*, that debt was maintainable on a promissory note, by payee against maker, though the instrument did not express that it was for value received, or for any consideration. See further, *Hubble v. Fogartie*, 3 Rich. 413; *Kendall v. Galvin*, 15 Maine, 131.

<sup>(r)</sup> Per Lord *Ellenborough* in *Grant v. Da Costa*, 3 Maule & S. 351.

state that it was for value received by the drawer, it will be a variance.(s) "Value received," in a promissory note, means received by the maker of the payee.(t)

It is now well settled, that any statement in a bill or note respecting the consideration may be explained or contradicted by parol evidence. It may be shown, notwithstanding any such statement, either that there was no consideration at all, or that the consideration was different from that stated.(u)

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(s) *Highmore v. Primrose*, 5 Maule & S. 65; *Priddy v. Henbrey*, 1 B. & C. 674.

(t) *Clayton v. Gosling*, 5 B. & C. 361.

(u) Thus, in *Abbott v. Hendricks*, 1 Man. & G. 791, in an action on a promissory note, in which the consideration was expressed to be "for commission due to the plaintiff for business transacted for the defendant," the defendant pleaded that the real consideration for the note was services to be thereafter rendered by the plaintiff, which had never been performed. The plaintiff replied *de injuria*. *Held*, that evidence in support of this plea was admissible, and ought to have been received by the judge at the trial. *Tindal*, C. J. said: "I have always understood the law to be, that where an action is brought on a promissory note by the payee against the maker, the defendant may show either that there was no consideration for the note, or that the consideration has failed. Here, the defendant sought to set up the latter ground of defence; and *Foster v. Jolly*, 1 Crompt. M. & R. 703, is a sufficient authority that the evidence for that purpose ought to have been received. All the cases cited on the part of the plaintiff have been to the point, that, where a promissory note or bill of exchange has been given, the defendant is not at liberty to set up a different contract from that expressed in the instrument; that is to say, where the contract on the face of a note is absolute, the defendant will not be permitted to prove that it was contingent; if payable at a certain time, that period cannot be varied; and where the note is in terms joint, evidence will not be allowed to be given that one of the parties was merely a surety. The distinction seems to be this: You may show, either that there was no consideration for the contract, or that it has failed; but you cannot set up a different contract, for that is contrary to the general principles of the law. As a defendant may prove, where 'value received' is expressed in a note, that there was no consideration, so where a special consideration is stated, I think he is at liberty to show that it has failed." *Bosanquet*, J.: "I am of opinion that the evidence tendered was not rendered inadmissible by reason of the statement contained in the note. It is true, that the terms of a contract cannot be varied by a parol agreement; but the want of a consideration, or the illegality of the consideration, is a good defence in an action on a promissory note. Although a note is expressed to be given for a good consideration, it may be shown, either that there was no consideration, or that the consideration was illegal. If it were competent to parties to exclude such evidence, it would be contrary to every principle of justice. It is the constant practice to admit it; and yet I do not see why it ought not to be excluded, if the statement contained in the present note is to shut out the evidence tendered at the trial." *Coltman*, J.: "I have always understood the rule to be, that although you cannot vary the terms of a note by parol evidence, you may give evidence to show either that it was originally made without consideration, or that the consideration has failed. This is fully borne out by the authorities that have been cited. With respect to the cases referred to on the part of the plaintiff, they are distinguishable on the ground that in those cases the evidence sought to be introduced did not refer to the

A debt from a third person is, in general, a good consideration for a note.(v) It certainly would be so, if a delay in calling in the debt entered expressly into the bargain. Perhaps, if the debt were payable at once, and the note payable at a future day, or if both were payable in future and the note on the longest time, such agreement for delay would be implied. If the original debt, from the third person, were payable only when the note was payable, whether at once or in future, there might be a want of consideration, unless credit for the original debt had been given on the promise of this note, which certainly would be sufficient.(w)

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consideration, but went to vary the terms of the contract. It seems to me that there was a miscarriage in this case, in not admitting the evidence offered at the trial." *Maule, J.*: "I also think that the evidence in question ought to have been received. That evidence was tendered to show that the note was given for services to be afterwards rendered, and that they had never been performed, and it was rejected on the authority of *Adams v. Wordley*, 1 M. & W. 374. The cases show, that, although a consideration is stated in the note, you may prove that it was given for a different consideration, or without any consideration at all. The court is not called upon to say whether the plea is good. It does not state that the services were to be rendered within a reasonable time; but at present no point arises upon it." And see, to the same effect, *Barker v. Prentiss*, 6 Mass. 430; *Matlock v. Livingston*, 9 Smedes & M. 489; *Simonton v. Steele*, 1 Ala. 357; *Litchfield v. Falconer*, 2 Ala. 280; *Smith v. Brooks*, 18 Ga. 440. Some of the *dicta* in *Ridout v. Bristow*, 1 Crompt. & J. 231, must be regarded as overruled.

(v) *Poplewell v. Wilson*, 1 Stra. 264; *Coombs v. Ingram*, 4 D. & R. 211; *Burkitt v. Ransom*, 2 Collyer, 395. In *Mansfield v. Corbin*, 2 Cush. 151, on the trial of an action by the promisee against the maker of a promissory note, which had been given for a debt of the defendant's son, who, at the time of giving the same, was of full age, the jury were instructed that the note was without consideration, unless it was given with the knowledge or at the request of the son, or unless, when it was given, the plaintiff did in fact discharge the debt due to him from the son; it was *held*, that these instructions were insufficient, inasmuch as they precluded the jury from considering all evidence of any other ground of consideration for the note. *Wilde, J.* said: "These instructions excluded from the consideration of the jury any evidence of a discharge of the debt afterwards, or of a promise to discharge it, or of a promise to delay to prosecute, or an actual delay; either of which, if proved, would be a sufficient consideration. Indeed, the slightest consideration would be sufficient."

(w) In *Childs v. Monins*, 2 Brod. & B. 460, it was *held*, that a promissory note, by which the makers, as executors, jointly and severally, promised to pay on demand with interest, rendered them personally liable. *Dallas, C. J.* said: "They promise absolutely, and, further, add an engagement to pay interest; when, therefore, by the engagement to pay interest, they have induced the plaintiff to suspend his clear and admitted demand, by so doing they make the promise personal and individual. . . . If executors were not liable on such a promise, they would be enabled, by making such a promise, to defraud any individual among their testator's creditors. This, too, is a promise which, from the circumstance of interest being added, necessarily imports a payment at a future day, and an executor promising to pay a debt at a future day makes the



So if the note is received in absolute payment and discharge of the debt of the third person, there is undoubtedly a sufficient consideration; and in Massachusetts and Maine it will be presumed to have been so received, in the absence of evidence to the contrary.<sup>(x)</sup> If the original debtor were dead, the debt would still be a good consideration if he had personal representatives, and the debt were provable against the estate. If it were otherwise, the sufficiency of the consideration might be doubted.<sup>(y)</sup>

Compromises of uncertain or conflicting rights constitute a valid consideration. The law favors these, and will not inquire into the question compromised, or the relative force or value of rights, if there be only an actual and honest compromise of what are supposed to be valid claims.<sup>(z)</sup> But it must not be the abandonment of a suit (as for any offence) of which public policy requires the prosecution, although a civil action for an injury may be lawfully compromised.<sup>(a)</sup> Thus, a note in consideration of a release of damages for slander is valid, although the words spoken are not actionable.<sup>(b)</sup> A mere mistake of the law will not impeach a compromise; <sup>(c)</sup> but it will be strictly examined, if between parties who have stood in a fiduciary relation, as guardian and ward, trustee and *cestui que trust*, or, perhaps, insured and insurer.<sup>(d)</sup> Whether agreements to compromise, not yet carried into effect, are binding, may not be quite settled. In England it may certainly be doubted; <sup>(e)</sup> but we incline to

debt his own." In *Crofts v. Beale*, 11 C. B. 172, in assumpsit by payee against maker, on a promissory note payable on demand with interest, the defendant pleaded, that the note was made by the defendant as a collateral security for a debt due from one J. S. to the plaintiff; that the defendant was not, at the time of making the note, or ever, liable to pay the debt, or to give the note as a security for the same; and that there never was any other consideration for the making of the note, save as aforesaid. *Held* a sufficient plea of no consideration, after verdict. See also, *Sison v. Kidman*, 3 Man. & G. 810, 11 L. J., C. P., N. S. 100, commented on in *Crofts v. Beale*, *supra*.

<sup>(x)</sup> *Thacher v. Dinsmore*, 5 Mass. 299. See *post*, chapter on Payment by Note or Bill.

<sup>(y)</sup> See *Serle v. Waterworth*, 4 M. & W. 9; s. o. *nom.* *Nelson v. Serle*, 4 M. & W. 795; *Jones v. Ashburnham*, 4 East, 455.

<sup>(z)</sup> *Longridge v. Dorville*, 5 B. & Ald. 117; *Russell v. Cook*, 3 Hill, 504; *Stewart v. Ahrenfeldt*, 4 Denio, 189.

<sup>(a)</sup> *Keir v. Leeman*, 9 Q. B. 371; *Coppock v. Bower*, 4 M. & W. 361; *Gardner v. Maxey*, 9 B. Mon. 90; *Clark v. Ricker*, 14 N. H. 44; *Walbridge v. Arnold*, 21 Conn. 424.

<sup>(b)</sup> *O'Keson v. Barclay*, 2 Penn. 531.

<sup>(c)</sup> *Stewart v. Stewart*, 6 Clark & F. 911, 968; *Taylor v. Patrick*, 1 Bibb, 168.

<sup>(d)</sup> *Pickering v. Pickering*, 2 Beav. 31.

<sup>(e)</sup> See *Bridgman v. Dean*, 7 Exch. 199, 8 Eng. L. & Eq. 534.

think that such bargains, made in good faith, would be held in this country to create a mutual obligation.

If a note be left with arbitrators for them to decide upon, and they indorse a certain amount, leaving the balance payable, and do this by way of award, this note is held for consideration, and the indorsement is valid.<sup>(f)</sup> So a note in satisfaction of a breach of covenant, although no release is made, is valid, because the note has the effect of a release, substantially.<sup>(g)</sup> And where there is a hiring to service for a year, and the servant leaves without cause, and the master gives a note for the time he has served, this is a sufficient consideration; because the master may waive his right founded on the entirety of the contract, if he chooses to do so.<sup>(h)</sup> An agreement to reconvey, for a certain price, real estate held in fee under a foreclosure of a mortgage, to secure a debt of less amount than the value of the estate, is a sufficient consideration, although purporting to be made by two partners, and executed by one only, for a contemporaneous agreement to give a promissory note of a larger amount; and an action may be maintained to recover the full amount of a note so given.<sup>(i)</sup>

Love and affection alone are not a valid consideration for a promise or a note; not even from parent to child, or from child to parent; nor by a parent for his child, nor by a child for a parent; nor by a father and husband for his wife and children; unless there be something in the relation or the circumstances which creates a legal obligation.<sup>(j)</sup> Nor is a mere expectation of marriage; nor, indeed, any mere expectation without right; and on this ground it has been held, that the rendering of future services by the payee is not a good consideration for a promissory note, unless there is a binding contract for these services.<sup>(k)</sup> Nor is submission to arbitration by a married woman, without the husband's consent.<sup>(l)</sup> Nor is the promise of one to pay gen-

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<sup>(f)</sup> *Shephard v. Watrous*, 3 Caines, 166; *Schoonmaker v. Roosa*, 17 Johns. 301.

<sup>(g)</sup> *Moody v. Leavitt*, 2 N. H. 171.

<sup>(h)</sup> *Thorpe v. White*, 13 Johns. 53.

<sup>(i)</sup> *Myers v. Phillips*, 7 Gray, 508.

<sup>(j)</sup> *Holliday v. Atkinson*, 5 B. & C. 501; *Pennington v. Gittings*, 2 Gill & J 208; *Van Derveer v. Wright*, 6 Barb. 547; *Parker v. Carter*, 4 Munf. 273; *Smith v. Kittridge*, 21 Vt. 238. See *supra*, p. 178, note.

<sup>(k)</sup> *Hulse v. Hulse*, 17 C. B. 711.

<sup>(l)</sup> *Runsey v. Leek*, 5 Wend. 20.



erally, who is bound to pay only in an especial and representative capacity, binding, unless some new consideration intervene. *(m)* But a note by an administratrix, for "value received by my late husband," was held to imply and purport a consideration. *(n)* And although a contract may be void, or voidable, by the Statute of Frauds, a note given in pursuance of it will be valid. *(o)*

Forbearance of a debt, or any delay in enforcing or prosecuting any legal or equitable proceedings for any legal or equitable right, is a good consideration. *(p)* The delay or forbearance may be long or short, provided it is real. It need not be *adequate*, but must be actual and honest. *(q)* It may be the forbearance of a debt due from him who makes or transfers the note, or of the debt of another at his request; and it need not even be at the instance of the person liable to be sued. *(r)* It may be for a time certain, or for a reasonable time; or it may be general in its terms; and if for a reasonable time, the actual time should be alleged, and the court will determine whether it be reasonable. *(s)* If general in its terms, it will be deemed perpetual; and a suit at any time is a violation of the promise. *(t)*

It may be a cause of action which is yet to arise. *(u)* It must, however, be a claim or right which has some foundation in law. Thus, no valid consideration is created by forbearance to sue a note given by one insane or otherwise disabled, as by infancy or marriage; or by forbearance of a debt discharged by law, as if an obligor whose joint obligor has been released; or by forbearance to prosecute or insist upon illegal process; or where there are no parties liable to be sued. *(v)* If, however,

*(m)* Ten Eyck v. Vanderpoel, 8 Johns. 120; Schoonmaker v. Roosa, 17 Johns. 301; Bank of Troy v. Topping, 9 Wend. 273. But see Childs v. Monins, 2 Brod. & B. 460.

*(n)* Ridout v. Bristow, 1 Crompt. & J. 231.

*(o)* Jones v. Jones, 6 M. & W. 84. And see Abell v. Douglass, 4 Denio, 305.

*(p)* See 1 Parsons on Cont. 365.

*(q)* Jennison v. Stafford, 1 Cush. 168; Giles v. Ackles, 9 Penn. State, 147; Silvis v. Ely, 3 Watts & S. 420.

*(r)* See cases in preceding note.

*(s)* Lonsdale v. Brown, 4 Wash. C. C. 148; Sidwell v. Evans, 1 Penn. 385; Downing v. Funk, 5 Rawle, 69; King v. Upton, 4 Greenl. 387.

*(t)* Clark v. Russel, 3 Watts, 213; Sidwell v. Evans, 1 Penn. 385.

*(u)* Hamaker v. Eberley, 2 Binn. 506.

*(v)* Newell v. Fisher, 11 S. & M. 431; Herring v. Dorell, 8 Dowl. 604; Commonwealth v. Johnson, 3 Cush. 454; Wade v. Simeon, 2 C. B. 548.

there be an actual uncertainty or honest doubt as to the validity of the claim forborne, this seems to be enough to make the consideration good.*(w)* But no forbearance is a valid consideration, unless the promise to forbear, and the promise founded upon this, are mutually binding, giving a right of action on the breach of either.*(x)*

If a note is put in suit, which the maker gave to the payee at the request of a third person, the payee need not show that any consideration existed as between the maker and the party at whose request the note was given.*(y)*

Cross notes are a good consideration for each other; a promise being a valid consideration for a promise.*(z)* So is a fluctuating balance; and where acceptances were lodged with a banker as collateral security, it was held, that whenever the balance was in favor of the banker, he held those acceptances for value.*(a)* So is a judgment debt; for if a note be given, it either satisfies the judgment, or is and imports an agreement to delay enforcing it.*(b)* But if the judgment have been pre-

*(w)* Longridge v. Dorville, 5 B. & Ald. 117; Zane v. Zane, 6 Munf. 406; Blake v. Peck, 11 Vt. 483; Truett v. Chaplin, 4 Hawks, 178.

*(x)* Cobb v. Page, 17 Penn. State, 469.

*(y)* Horn v. Fuller, 6 N. H. 511; Mercer v. Lancaster, 5 Penn. State, 160. And see *supra*, p. 183, note *a*.

*(z)* Thus, in Rolfe v. Caslon, 2 H. Bl. 570, A drew a bill of exchange on B, payable to the order of A, which B accepted, and B drew a bill on A payable to the order of B, which A accepted, for their mutual accommodation. Both bills were payable at the same time, had the same dates, and contained the same sums. *Held*, that the two bills were mutual engagements, constituting on each part a debt, the one being a consideration for the other; that neither was given as an indemnity, which was in its nature conditional, but created an absolute debt from the beginning; so that if either party became bankrupt, the bill accepted by him might be proved under the commission, and, consequently, to an action brought on it his bankruptcy might be pleaded. And see to the same effect, Cowley v. Dunlop, 7 T. R. 565; Buckler v. Buttivant, 3 East, 72; Dockray v. Dunn, 37 Maine, 442; Dowe v. Schutt, 2 Denio, 621; Cushing v. Gore, 15 Mass. 69; Eaton v. Carey, 10 Pick. 211; Higginson v. Gray, 6 Met. 212; Whittier v. Eager, 1 Allen, 499. In Burdon v. Benton, 9 Q. B. 843, in an action by drawer against acceptor of a bill of exchange, it was *held*, that a plea that defendant accepted merely for plaintiff's accommodation, and that plaintiff did not, at any time, give any value or consideration for the acceptance, failed, if it appeared that, after the bill was accepted (as alleged) for accommodation, the plaintiff gave a cross acceptance and was obliged to pay the amount, and that the bill accepted by the defendant was due and unpaid at the time of the action brought. See further, Greenwood v. Pattison, 7 La. Ann. 197; Shannon v. Langhorn, 9 La. Ann. 526.

*(a)* Bosanquet v. Dudman, 1 Stark. 1; Bolland v. Bygrave, Ryan & M. 271.

*(b)* Baker v. Walker, 14 M. & W. 465.

viously satisfied in any way, or set aside, or avoided, it is no consideration.(c)

If a note given as an apprentice fee be sued, it is no answer that the misconduct of the master had terminated the apprenticeship, unless the note was on condition that the apprenticeship should continue for a certain time, and it ended sooner.(d) Generally, if a note be given for a promise, or a contract, of which performance can be enforced, a refusal to perform it is no defence to an action on the note. The defendant's remedy is by compelling performance of the promise for which the note was given.(e) The discharge, by a mother of an illegitimate child, of a prosecution brought by her against the putative father, is not only a valid consideration, but it is no defence that a prosecution was carried on by the overseers, and a decree for maintenance obtained.(f) If a note be given for a lottery-ticket, which is said and believed to have drawn a prize, it is no defence that it in fact drew a blank.(g)

If a note be given for a consideration passing between one of the parties to the note and a third person, and the payee sue the maker, it seems to be held immaterial in that action whether this consideration, as affecting the third party, has failed or not.(h)

It has been held, and we think rightly, that if one gives a note in fraud of his creditors, and the payee knows it, if the payee sues the note, the fraud may be given in defence.(i) For the parties are *in pari delicto*; and neither can found a claim upon it. If money had been paid, it could not be recovered back; but if, instead of money, a promise is made, in writing or by words only, that promise cannot be enforced.

If a copartnership note be given to a partner for a balance due him, and he indorse it over, it is no defence to an action by the indorsee, that the plaintiff knew between what parties and for what consideration it was given.(j) So, if a bill be drawn by

(c) *Dennison v. Brown*, 3 Vt. 170.

(d) *Grant v. Welchman*, 16 East, 207.

(e) *Moggridge v. Jones*, 14 East, 486; *Freligh v. Platt*, 5 Cowen, 494.

(f) *Haven v. Hobbs*, 1 Vt. 238; *Knight v. Priest*, 2 Vt. 507.

(g) *Barnum v. Barnum*, 8 Conn. 469.

(h) *Parsons v. Gaylord*, 3 Johns. 463; *Nickerson v. Howard*, 19 Johns. 113; *Hanger v. Cleveland*, 10 Mass. 415.

(i) *Bank v. Dalton*, 24 Pick. 141.

Cowen, 688. And see *ante*, p. 137, note z.

one partner and accepted, and it has the same effect upon a debt between the copartnership and the acceptor as if drawn by the firm, the acceptor is bound.<sup>(k)</sup> And if a firm be dissolved, and the copartners agree that one of them shall receive all the debts, and another of them draws a bill upon a debtor of the firm, which is accepted, the stipulation in the deed of dissolution is no defence to an action against the acceptor.<sup>(l)</sup> But the partner who drew must account with the partner who alone had, by the stipulation, a right to draw.<sup>(m)</sup> And generally, if one partner give another a note, a court of law will not investigate the accounts to ascertain whether the balance was due the payee; for the only remedy is in the equity jurisdiction over cases of partnership.<sup>(n)</sup> But if a member of a corporation, with no new consideration, give his note for a debt of the corporation, payable at a future day, the note is but a promise to pay the debt of another, without consideration.<sup>(o)</sup>

If an indorser make an express promise to the maker to take up the note, it is said that "there is no question," but this is a valid consideration for a note to the indorser.<sup>(p)</sup> The case in which this language is used does not require, nor perhaps justify, so broad a statement; and, as a general rule, we think it open to some doubt or qualification.

If one gives a note for a certain sum, under a mistaken belief that he is liable to the payee to that amount, the note is without consideration; although the mistake arose from a misapprehension of the law, and not from an ignorance of facts; the maxim, *ignorantia juris non excusat*, not being applicable to such a case.<sup>(q)</sup> *A fortiori*, a note given by a party in satisfaction of a liability from which he was discharged, in ignorance of the *facts*

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(k) Thus, in *Tomlin v. Lawrence*, 3 Moore & P. 555, the defendant having accepted a bill of exchange drawn on him by one of two partners, in his own name, for a debt due to both; it was *held*, that the defendant was liable in an action at the suit of an indorsee, as the defendant could not be sued for the debt due from him to the partners, until the bill of exchange was due and dishonored.

(l) *King v. Smith*, 4 C. & P. 108.

(m) *King v. Smith*, *supra*.

(n) *Rogers v. Rogers*, 1 Hall, 391.

(o) *Rogers v. Waters*, 2 Gill & J. 64.

(p) *Cushing v. Gore*, 15 Mass. 69.

(q) *Southall v. Rigg*, 11 C. B. 481. *Jervis*, C. J. said: "Want of consideration is altogether independent of knowledge either of the facts or the law."

which constituted such discharge, cannot be enforced against him, though he may have had the means of knowing those facts.<sup>(r)</sup>

If a corporation, required by law to invest its capital in a certain way, takes a note from a shareholder as a part of his stock, to a suit thereon he cannot object that such investment of the capital was not warranted by law.<sup>(s)</sup> Whether a subscription of money to create or increase the funds or capital is binding or not, must depend upon general considerations, which it would be out of place to present here. If they were binding, a note for the amount would certainly rest on a valid foundation; but we do not think that a note would make them so, or that the note should be recoverable between the parties, if the simple subscription were not; although it has been held otherwise.<sup>(t)</sup> If the subscription or the promise or note were made to persons who had no legal right to receive the money and apply it to that purpose, it seems quite clear that the note would not be valid.<sup>(u)</sup>

The prevailing rule in this country on this subject may be stated thus: If notes are given by one or more persons to any corporation or other legal person, or any trustees, by way of voluntary subscription, to raise a fund or promote an object, these notes are open to the defence of a want of consideration, unless the payee has expended money, or entered into engagements, which, by a legal necessity, must cause loss or injury to the payee if the notes are not paid. And the mere expectations of the payee would not be enough; nor the plans and purposes of the payee, if they have not led to actual obligation.<sup>(v)</sup> If sundry subscribers give their notes in such shape that they may be treated as given by each one to the rest, then, according to one

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<sup>(r)</sup> Therefore, where a bill of exchange, indorsed by A for the accommodation of the drawer, was afterwards altered in a material point, with the consent of the drawer, and when the bill was at maturity, B, the then holder, made a demand upon A, who, ignorant of the alteration, though he had ample means of knowing it, gave B a promissory note for the amount of the bill and expenses, it was *held*, that it was a good defence to an action on the note by B, that, at the time A gave it, he was not in fact aware of the alteration in the bill. *Bell v. Gardiner*, 4 Man. & G. 11. And see *Bullock v. Ogburn*, 13 Ala. 346; *Mercer v. Clark*, 3 Bibb, 224.

<sup>(s)</sup> *Little v. O'Brien*, 9 Mass. 423.

<sup>(t)</sup> See *Fisher v. Ellis*, 3 Pick. 322; *Amherst Academy v. Cows*, 6 Pick. 427.

<sup>(u)</sup> *Boutell v. Cowdin*, 9 Mass. 254.

<sup>(v)</sup> See 1 *Parsons on Cont.* 377, *et seq.*

authoritative decision at least, the notes of the rest would be a valid consideration for the note of each subscriber. (*w*)

## SECTION II.

### OF FAILURE OF CONSIDERATION.

THE entire failure of consideration, after a note is given, is as complete a defence as an original absence of all consideration. (*x*) And a partial failure is, under certain circumstances, a partial and proportional defence. (*y*) We must, however, discriminate between a failure of consideration and a failure of benefit resulting from it. A promises B to do a certain thing, and B makes his note to A in consideration of this promise. Then A fails entirely to perform his promise, but sues B on his note. If B retains A's promise, or if the contract is such that A is always and permanently held on his promise, B cannot defend against the note on the ground of a failure of consideration. (*z*) But if B cancels

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(*w*) *George v. Harris*, 4 N. H. 533.

(*x*) See *Jackson v. Warwick*, 7 T. R. 121 (and compare it with *Grant v. Welchman*, 16 East, 207); *Mann v. Lent*, 10 B. & C. 877; *Cuff v. Brown*, 5 Price, 297; *Knowles v. Parker*, 7 Met. 30.

(*y*) See *infra*.

(*z*) In *Spiller v. Westlake*, 2 B. & Ad. 155, it was *held* to be no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid by the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day, and that such estate had not been conveyed. Lord *Tenterden* said: "Where, by one and the same instrument, a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money until he executes or offers to execute a conveyance; but here the vendee, by a distinct instrument, agreed to pay part of the purchase-money on the second of February. I can see no reason why he should have executed a distinct instrument whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events. In the cases cited, the concurrent acts were stipulated for in the same instrument; here the payment of the £200 (which was part only of the purchase-money) was separately provided for." *Parke, J.*: "I incline to think that the defence to this action would have been maintainable, if the circumstances had been such that the defendant, having paid the £200 as a deposit, would have been so entitled to recover it back; but it is perfectly clear that he could not have been so entitled as long as the contract remained open. Now here the contract remained open at the time when the action was com-

A's promise, and A accepts this, the contract is so far rescinded and annulled, and then the consideration for the note fails. So if one sells with warranty, and there is a breach, this does not permit the buyer to defend against the note he gave for the price; (a) at least, unless the property proved to be entirely worthless. (b) There should be also, it has been held, an offer to

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menced, for the plaintiffs agreed only to convey the estate subject to the two mortgages. They were never bound to convey the legal estate to the defendant, but merely the equity of redemption; and that they had never refused to convey." In *Trask v. Vinson*, 20 Pick. 105, where the consideration of the note sued on was the assignment of an agreement to convey certain real estate, *Morton, J.* said: "The defendant's counsel argues, that if the contractor fails to convey according to the terms of his agreement, this will be a failure of the consideration of the notes. In support of the argument he relies upon the cases of *Dickinson v. Hall*, 14 Pick. 217, and *Rice v. Goddard*, 14 Pick. 293. There it was holden that where the consideration of a note was the conveyance of property, real or personal, and the title failed, so that nothing passed by the conveyance, the note was *nudum pactum*. Those cases were well considered, and are founded on sound principles, and supported by an irresistible current of authorities. With the exception of a few *obiter dicta* in our own reports, and the case of *Lloyd v. Jewell* in Maine, 1 Greenl. 352, scarcely a dictum to the contrary can be found, while there is a remarkable coincidence in all the other American and English decisions upon the subject. But those cases are unlike the present. There, the real consideration, the moving cause of the promise to pay, was the estate actually conveyed; here, it is an agreement to convey, at a future time, and upon the happening of a future event. That was an executed, this an executory contract. The rule of damages, too, would be different in the two cases. There, the rule of damages would be the exact amount of the consideration paid; here, it would be the value of the estate at the time it was to be conveyed. There, if the promisor was holden to pay his note, he might recover for the breach of the covenant of seisin precisely the same sum. Here, the damages recoverable on the stipulation or covenant might be more or less than the amount paid or received." In *Moggridge v. Jones*, 3 Camp. 38, 14 East, 486, A having agreed to execute a lease of premises to B, who was to pay a certain sum for it; and B, who was let into possession, having accepted a bill for the consideration money drawn on him by A; it was *held* to be no defence to an action on the bill by A against B, that the former refused to execute the lease, but his remedy must be on the agreement. *Lord Ellenborough* said: "The money agreed upon for the premises would have been payable immediately; but for the convenience of the defendant, the plaintiff agreed to take his acceptances at a future day. This bill must, therefore, be paid in course when due; and the defendant will have his remedy upon the agreement for the non-execution of the lease." So in *Freligh v. Platt*, 5 Cowen, 494, where a promissory note was given in consideration of a sale of pews followed with possession in the vendee, it was *held* to be no defence that the vendor refused to convey. The remedy was by compelling a performance. In *Chapman v. Eddy*, 13 Vt. 205, it was *held* to be no defence to a note, that the consideration thereof was a promise, by the payee, to give a deed of a pew, by a certain time thereafter, which was not done within the time specified, nor until after the commencement of the action on the note. And see *Wade v. Killough*, 3 Stew. & P. 431; *George v. Stockton*, 1 Ala. 136; *Read v. Cummings*, 2 Greenl. 82.

(a) *Obbard v. Betham*, Moody & M. 483. And see *infra*, p. 207, note i.

(b) *Shepherd v. Temple*, 3 N. H. 455. In this case it was *held*, that in an action on



return the property and rescind the contract.(c) The buyer's remedy must be by an action on the warranty. But if there is fraud, this avoids the note, although the buyer may also have his action for the deceit.(d) So it is no defence that the goods for which the note is given are far less in value than was supposed; for this, in the absence of fraud or warranty, would not be either a partial or total failure of consideration, as the buyer takes that risk upon himself.(e) And this might be so even if the loss of value were nearly total, provided the thing supposed to be sold was sold and delivered. If one gave his note for a hundred hogsheads of sugar, and it was found that the sugar had been washed out or otherwise abstracted, in whole or in part, this would be a total or partial failure of consideration. But if the sugar was there, but not so good as the buyer expected, or not worth so much in the market, or even if it were mixed with sand or otherwise deteriorated, not so as to be worthless and unsalable, but so as to be of less value than the buyer expected, this would not be a partial failure of consideration, nor would it, generally,

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a promissory note given for the price of goods sold with a warranty, it is a good defence that the goods turned out to be of no value. And see *Rumsey v. Sargent*, 1 Foster, 399.

(c) *Thornton v. Wynn*, 12 Wheat. 183. See *Kase v. John*, 10 Watts, 107.

(d) *Lewis v. Cosgrave*, 2 Taunt. 2; *Solomon v. Turner*, 1 Stark. 51; *Fleming v. Simpson*, 1 Camp. 40, note.

(e) Thus, in *Rudderow v. Huntington*, 3 Sandf. 252, where goods were sold by an auctioneer, without any warranty or misrepresentation, and the same turned out to be spurious, and the labels upon them counterfeit, it was *held*, that this was no defence to an action on a note given for the purchase-money, there being no proof that the auctioneer knew the fact of the spurious nature of the goods, or that he had any better means of judging of their genuineness than the buyers possessed. And see *Fleming v. Simpson*, 1 Camp. 40, note. So in *Reed v. Prentiss*, 1 N. H. 174, it was *held* to be no defence to an action on a note, that the article for which it was given proved to be of no value. But had the property never passed, or had fraud been practised, or an express warranty been broken in relation to the article, either of these circumstances might have defeated the action. In *Perley v. Balch*, 23 Pick. 283, *Morton, J.* said: "If a chattel be of no value to any one, it cannot be the basis of a bargain; but if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it be a loss to the seller, he is entitled to remuneration for his loss." In *Johnson v. Titus*, 2 Hill, 606, it was *held*, that if an article sold be of the slightest value to either the vendor or vendee, it will suffice by way of consideration for a promise to pay the agreed price, however disproportionate to the real value. Accordingly, where one purchased mulberry-trees which turned out to be of no value to him, by reason of being decayed and almost lifeless, it was *held*, that, as there was neither fraud nor warranty in the case, this constituted no defence to an action on a note given for the price. And see *Welsh v. Carter*, 1 Wend. 185.



give the promisor any defence or remedy, unless he should prove fraud or misrepresentation, or warranty, express or implied.

So also, it is no defence to an action on a bill of exchange given for the purchase-money of property sold, that, two months after the delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that act as a rescission of the contract, but must bring trespass.<sup>(f)</sup> We should think, however, that if the vendor retook the goods as an act of rescission, the vendee might assent to this, and then could defend against the note as avoided.

But if a note be given in payment of the price of certain goods sold by the payee to the maker, as of the manufacture or growth of a particular person, and answering certain samples, to be delivered by the payee to the maker within a reasonable time; and the payee fails to deliver goods answering to the description of the contract, this will constitute a complete defence to an action on the note.<sup>(g)</sup> Under such circumstances, the vendee has a right to rescind the contract; and if the purchase-money had already been paid, he might recover it back.

It has been held, that a note for a patent right cannot be enforced if the patent is void, although the seller sold with it some materials, which, however, had no value to the buyer unless the patent was valid.<sup>(h)</sup> We should say this is law, although the

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<sup>(f)</sup> *Stephens v. Wilkinson*, 2 B. & Ad. 320.

<sup>(g)</sup> *Wells v. Hopkins*, 5 M. & W. 7. In this case, to an action by the indorsee against the drawer of a bill of exchange, the defendant pleaded that the bill was given in payment of the price of seventeen pockets of hops sold by the plaintiff to the defendant, as hops of a certain grower, and answering certain samples, to be delivered by the plaintiff to the defendant within a reasonable time; that, although a reasonable time had elapsed, the plaintiff had not delivered to the defendant any hops answering the samples, or any hops whatsoever; and that there was no consideration for the bill except as aforesaid. Replication, *de injuria*. It appeared that the plaintiff had delivered to the defendant seventeen pockets of hops, but inferior to the samples. *Held*, that the general allegation in the plea, that the plaintiff had not delivered any hops whatever, was immaterial, and might be rejected; and that, without it, the plea showed a total failure of consideration, and was an answer to the action. *Held*, also, that if the plaintiff relied on the defendant's acceptance of the inferior hops, he ought to have replied it. *Alderson*, B. said: "The latter allegation in the plea was an immaterial one, which need not be proved. It is a total failure of consideration, if there be a bargain for a certain kind of goods to be delivered in a reasonable time, and no such goods are delivered within a reasonable time." And see *Bowles v. Newby*, 2 Blackf. 364.

<sup>(h)</sup> *Bliss v. Negus*, 8 Mass. 46; *Earl v. Page*, 6 N. H. 477; *Dunbar v. Marden*, 13 N. H. 311; *Jolliffe v. Collins*, 21 Misso. 338; *Geiger v. Cook*, 3 Watts & S. 266. In *Dickinson v. Hall*, 14 Pick. 217, where the purchaser of a patent right gave therefor

authorities are not uniform.(i) So where A appointed B his executor, and gave him a note by way of compensation for the trouble he was to have, and B died first, and his executors sued A, the performance of B's promise to act as A's executor having become impossible, it was held that the consideration had wholly failed.(j) So if, in an action on a note, it appears that for a definite part the note was for a consideration, and for the residue an accommodation note, the payee recovers only for that part which was founded upon consideration.(k)

It is, however, important to observe, that where a partial failure of the consideration is alleged by the defendant, this part must be distinct and definite, for only a total failure or a specific and ascertained failure of a part can be availed of by way of defence. For any other, the defendant can only have his set-off or cross action. In several English cases, it is stated generally that a partial failure of consideration is no defence; but they all turn upon the above distinction.(l) Thus, it is always a good defence,

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his promissory note, and the patent proved to be void, the note was *held* to be entirely without consideration, notwithstanding the vendor covenanted that he had good right to sell and convey the patented privileges, and that he would warrant the same against the claims of all persons. The court were of opinion, "that, the patent right being void, there was a total want of consideration for the defendant's promissory note, unless the plaintiff's alleged covenant of title in the patent right constituted a consideration; that such a covenant would not constitute a valid consideration, for the object of the defendant in making this contract was to obtain, not a mere covenant, but the conveyance of a patent right; that, although the plaintiff might have purchased and sold the supposed patent right thinking it to be valuable property, still he could not recover in this action, for the defence did not rest on the ground of fraud, but on the ground that the defendant had received no value, and his promise was *nudum pactum*."

(i) See *Williams v. Hicks*, 2 Vt. 36.

(j) *Solly v. Hinde*, 2 Crompt. & M. 516.

(k) *Darnell v. Williams*, 2 Stark. 166; *Barber v. Backhouse*, Peake, 61; *Cline v. Miller*, 8 Md. 274.

(l) Thus, in *Morgan v. Richardson*, 1 Camp. 40, note, which was an action against the acceptor of a bill of exchange at the suit of the drawer, the bill being payable to his own order, the defence was, that the bill had been accepted for the price of some hams bought by the defendant from the plaintiff, to be sent to the East Indies; and that the hams had turned out so very bad that they were almost quite unmarketable. The sum for which they actually sold was paid into court. Lord *Ellenborough* held, that though, where the consideration of a bill of exchange fails entirely, this will be a sufficient defence to an action upon it, by the original party, it is no defence to such action that the consideration fails partially; but that under such circumstances the giver of the bill must take his remedy by an action against the person to whom it is given. So in *Tye v. Gwynne*, 2 Camp. 346, in an action on a bill of exchange accepted for the price of goods purchased for exportation, it was *held*, that the purchaser could not give in evi-

that the contract on which the note was given has been rescinded; (m) or that the property in the thing sold did not

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dence that the goods were of a bad quality, and improperly packed; but was driven to his cross action. Lord *Ellenborough* said: "Sitting here, I shall certainly adhere to the judgment of the court in *Morgan v. Richardson*. Although money was there paid into court, that circumstance formed no ingredient in the opinion I then expressed. A bill of exchange cannot be accepted on a *quantum meruit*. There is a difference between want of consideration and failure of consideration. The former may be given in evidence to reduce the damages; the latter cannot, but furnishes a distinct and independent cause of action." In *Obbard v. Betham*, Moody & M. 483, in an action by the drawer against the acceptor of bills of exchange given for goods supplied, which were to be "of good quality and moderate price," and were estimated at about £400, and the bills given for that amount; it was *held* to be no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor had paid more than the real value of the goods on the bills. Lord *Tenterden* said: "The cases cited for the plaintiffs have completely established the distinction between an action for the price of the goods, and an action on the security given for them. In the former, the value only can be recovered; in the latter, I take it to have been settled by those cases, and acted upon ever since as law, that the party holding bills given for the price of goods supplied can recover upon them, unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action. The warranty relied on in this case makes no difference. In *Morgan v. Richardson*, the hams bought turned out unmarketable. That was just as much a breach of warranty as there is in the present case; for every man selling a commodity warrants it to be of merchantable quality; no purchaser buys except upon that understanding." In *Day v. Nix*, 9 J. B. Moore, 159, it was *held*, that a partial failure of consideration for a promissory note constitutes no ground of defence, if the *quantum* to be deducted on that account is matter not of definite computation, but of unliquidated damages; as, where a note was given for the plaintiff's disclosing to the defendant an improvement in certain machinery, which turned out to be less beneficial than was anticipated by the parties. In *Trickey v. Larne*, 6 M. & W. 278, to an action by drawer against acceptor of a bill of exchange for £20 8s. 6d., the defendant pleaded that, before the drawing and acceptance of the bill, it was agreed between the plaintiff and defendant that the plaintiff should do certain carpenter's work for the defendant for £63; that the defendant paid the plaintiff £43 in part payment of the £63, and afterwards accepted the bill of exchange, on account of the residue of the £63; that the plaintiff did not perform his agreement, but neglected to perform some work, and performed in an unworkmanlike manner other work, necessary to be done under the agreement; and that the £43 was more than the whole work done was worth. *Held* bad, on motion for judgment *non obstante veredicto*, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration, to which the money payment and the bill were alike applicable. See also, *Gascoyne v. Smith*, M'Cl. & Y. 338. In *Warwick v. Nairn*, 10 Exch. 762, to an action by the drawer against the acceptor of a bill of exchange for £313 12s. 9d. the defendant pleaded, except as to £108 15s. 3d. parcel, that the bill was drawn and accepted in respect of the price of certain goods sold by the plaintiffs to the defendant, and for no other debt; that, at the time of sale, the plaintiffs promised the defendant that the goods should be of a certain quality; that he bought the goods and accepted

(m) *Benson v. Smith*, 2 La. 102.

pass ; (n) or that it is wholly without value. And we should infer from what seems to be the weight of authority, that it is a sufficient defence, that the title of the vendor has wholly failed,

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the bill on the faith of the plaintiffs' promise ; that the goods delivered were not of the quality specified, but of inferior quality, and that they were of the value of £108 15s. 3d and no more ; and that, save as aforesaid, there never was any value or consideration for the making or accepting the said bill of exchange. *Held*, on demurrer, that the plea was bad. *Per curiam* : " The plaintiffs are entitled to judgment. The authorities are decisive that this plea is bad. If the defendant seeks to have them overruled, he must take the case to the Court of Error." *Sully v. Freen*, 10 Exch. 535, is to the same effect. In *Drew v. Towle*, 7 Fost. 412, it was *held*, that a partial failure of consideration is a good defence to a promissory note, where the amount to be deducted on that account is matter to be ascertained by mere computation ; but it is otherwise where such amount depends upon the ascertainment of unliquidated damages. In *Elminger v. Drew*, 4 McLean, 388, where the consideration of the note was a quantity of fish sold by the payee to the maker, and warranted to be " well cured, good, sound, and wholesome ;" it was *held*, that a breach of this warranty was no defence to an action on the note. And see, to the same effect, *Washburn v. Picot*, 3 Dev. 390. So in *Pulsifer v. Hotchkiss*, 12 Conn. 234, it was *held*, that, in an action on a bill or note, the defendant cannot show a partial failure of consideration to reduce the damages, if the *quantum* to be deducted, on account of such partial failure, is not of definite computation, but of unliquidated damages, and there has been no attempt to repudiate the contract or restore the consideration. Therefore, where A had sold an interest in a patent right to B, accompanied with a false representation ; and the interest thus sold was of some value, but of less than it would have been if the representation had been true, but the difference was of an uncertain and unliquidated amount, and B did not repudiate the contract, nor offer to restore the interest sold ; in an action on a promissory note given by B to A for such interest, it was *held*, that B could not avail himself of such partial failure of consideration to reduce the damages below the sum expressed in the note. But see *Andrews v. Wheaton*, 23 Conn. 112. In *Spalding v. Vandercook*, 2 Wend. 431, where the consideration of the note declared on was the making of a quantity of provision barrels by the plaintiff for the defendant, under an agreement to manufacture the same so that they would pass inspection under the law regulating the inspection of beef and pork ; it was *held*, that the defendant might show, in order to reduce the amount of the plaintiff's recovery, that a portion of the barrels were manufactured in an unskilful manner, and not in compliance with the terms of the contract, whereby the defendant lost the sale of the same. So in *Harrington v. Stratton*, 22 Pick. 510, in an action by the payee against the maker of a promissory note given for the price of a chattel, it was *held* competent for the maker to prove, in reduction of damages, that the sale was effected by means of false representations of the value of the chattel, on the part of the payee, although the chattel had not been returned or tendered to him. In *Peden v. Moore*, 1 Stew. & P. 71, it was *held*, that whenever a defendant can maintain a cross action for damages, on account of a defect in personal property purchased by him, or for a non-compliance by the plaintiff with his part of the contract, the former may, in defence to an action upon his note, made in consequence of such purchase or contract, claim reduction corresponding with the injury he has sustained. And see *Wadsworth v. Smith*, 23 Maine, 562 ; *Hills v. Bannister*, 8 Cowen, 31 ; *Wade v. Scott*, 7 Misso. 509 ; *Barr v. Baker*, 9 Misso. 840.

(n) *Reed v. Prentiss*, 1 N. H. 174.

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even if he is liable on covenants in his deed ; but the cases cited in our note will show that this is not certain.(o) But a failure of title to a part of the land, or incumbrance upon it,(p) or the exorbitant price of the goods, or that they were damaged, although supposed to be sound, would not be a defence. Nor will

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(o) The first case on this point was *Frisbee v. Hoffnagle*, 11 Johns. 50. H. gave a promissory note to F. for the purchase-money of a certain piece of land, conveyed by F. to H. by deed, with warranty ; and at the time of the conveyance there was a judgment against F., under which the land was afterwards sold and conveyed. In an action brought by F. against H. on the note, it was *held*, that the suit could not be maintained, as the consideration of the note had wholly failed, the title of H. being extinguished by the sale under the judgment, though he had not yet been evicted by the purchaser, for he was liable to be evicted, and was responsible to him for the *mesne profits*. The doctrine of this case has generally been followed substantially. In *Rice v. Goddard*, 14 Pick. 293, the court said : " The note was given in consideration of the conveyance of land by deed with the usual covenants of seisin and warranty. The title to the land failed entirely ; and the question is, whether that want of title is an entire want of consideration for the note, so as to render it *nudum pactum*, or whether the covenants were of themselves a sufficient consideration to support the promise. It was decided by the court in Maine, in *Lloyd v. Jewell*, 1 Greenl. 360, that the covenants were a sufficient consideration. The decisions of that court are entitled to great respect ; the opinion, however, in the case cited, was grounded on what was considered to be the settled law of Massachusetts ; but though there have been *dicta*, (*Fowler v. Shearer*, 7 Mass. 19 ; *Phelps v. Decker*, 10 Mass. 279,) there has been no decision in this State to that effect, and so the foundation of the opinion fails. The same subject has been before the courts of other States, and the decisions have uniformly been, that a total failure of title is a total failure of the consideration. *Frisbee v. Hoffnagle*, 11 Johns. 50 ; *M'Alister v. Reab*, 4 Wend. 483 ; *Steinhauer v. Witman*, 1 S. & R. 447 ; *Gray v. Handkinson*, 1 Bay, 278 ; *Bell v. Huggins*, 1 Bay, 327 ; *Chandler v. Marsh*, 3 Vt. 162 ; *Tillotson v. Grapes*, 4 N. H. 448. The promise is not made for a promise, but for the land ; the moving cause is the estate ; and if that fails to pass, the promise is a mere *nudum pactum*. It was objected, that the rule of damages in an action on the covenant would be different from the consideration of the promise ; but in the case of a total failure of title, the amount of damages would be the same ; and it is just that a party should be allowed to show a total failure, in an action on the promise, instead of being compelled to seek his remedy on the covenants." But in *Hoy v. Taliaferro*, 8 Smedes & M. 727, it was *held*, that a vendee of land who has received a deed with covenants of warranty, and been let into possession, cannot, when sued at law on the notes given for the purchase-money, set up the defence of failure of consideration, without showing an actual eviction. See further, *Knapp v. Lee*, 3 Pick. 452 ; *Trask v. Vinson*, 20 Pick. 105 ; *Cook v. Mix*, 11 Conn. 432 ; *Jenness v. Parker*, 24 Maine, 289 ; *Drew v. Towle*, 7 Foster 412 ; *Tyler v. Young*, 2 Scam. 444 ; *Gregory v. Scott*, 4 Scam. 392 ; *Slack v. McLagan*, 15 Ill. 242 ; *Scudder v. Andrews*, 2 McLean, 464. But see *Young v. Triplett*, 5 Littell, 247 ; *Cullum v. Branch Bank*, 4 Ala. 21 ; *Dunn v. White*, 1 Ala. 645 ; *Wilson v. Jordan*, 3 Stew. & P. 92.

(p) *Greenleaf v. Cook*, 2 Wheat. 13 ; *Howard v. Witham*, 2 Greenl. 390 ; *Wentworth v. Goodwin*, 21 Maine, 150 ; *Morrison v. Jewell*, 34 Maine, 146 ; *Chase v. Weston*, 12 N. H. 413 ; *Lattin v. Vail*, 17 Wend. 188 ; *Jenness v. Parker*, 24 Maine, 289.

a court of equity, where the failure of consideration is unliquidated, restrain an action on the note and bill, and order an account.(q)

It is certain that a mere inadequacy of value is not the same as, and has not the effect of, a total or a partial failure of consideration.(r) And we apprehend that the difficulty of discriminating between inadequacy and partial failure has been a principal cause of the conflict among the American cases as to the effect of a partial failure of consideration. They cannot be wholly reconciled; but we believe that the principles we have stated above are sustained by the weight of authority. It is quite certain, not only that fraud would always be a good defence, but that extreme inadequacy of value might be evidence of fraud, and the evidence would be stronger as this inadequacy was greater.

A partial want of consideration, like a partial failure, is a good defence *pro tanto*. But a distinction is to be observed between the two. A partial failure of consideration, as we have seen, furnishes no defence, unless the amount is ascertained and liquidated. But when there is originally a partial want of consideration, that will be a good defence *pro tanto* in all cases. Thus, if a note be given by a father to a son, partly in payment for services and partly as a gratuity, so far as it is given upon the latter ground it is without consideration, and this will be a good defence. And it is no objection, that there was no agreement or understanding of the parties, or any act or declaration of the maker, to designate what part of the aggregate amount of the note was intended to be a compensation for services, and what part to be a gratuity. The question, what amount was founded on one consideration and what on the other, is to be settled by the jury upon the evidence.(s)

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(q) *Glennie v. Imri*, 3 Younge & C., Exch. 436.

(r) *Solomon v. Turner*, 1 Stark. 51.

(s) *Parish v. Stone*, 14 Pick. 198. In this case, *Shaw*, C. J., after citing the English cases, which establish the doctrine that a partial failure of consideration furnishes no defence, unless the amount is liquidated, said: "All the cases put are those of failure of consideration, where the consideration was single and entire, and went to the whole note, and was good and sufficient at the time the note was given, but by some breach of contract, mistake, or accident, had afterwards failed. There the rule is, if the consideration has wholly failed, or the contract been wholly rescinded, it shall be a good defence to the note. But if it have partially failed only, it would tend to an inconvenient mode of trial and to a confusion of rights to try such question in a suit on the note, as a partial defence, and therefore the party complaining shall be left to his cross



## SECTION III.

## OF ILLEGAL CONSIDERATION.

AN illegal consideration is a void one, for the reason that the law cannot recognize a value in that which it forbids, nor enforce

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action. This distinction, and the consequence to be drawn from it, are alluded to by Lord *Ellenborough* in *Tye v. Gwynne*, 2 Camp. 346. He says : ‘ There is a difference between want of consideration and failure of consideration. The former may be given in evidence to reduce the damages ; the latter cannot, but furnishes a distinct and independent cause of action.’ It seems, therefore, very clear, that want of consideration, either total or partial, may always be shown by way of defence ; and that it will bar the action, or reduce the damages, from the amount expressed in the bill, as it is found to be total or partial respectively. It cannot, therefore, in such case, depend upon the state of the evidence, whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended to be in a great degree gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt, and what a gratuity. The rule to be deduced from the cases seems to be this, — that where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, — there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. In the application of this principle, there seems to be no reason why it shall depend upon the state of the evidence, showing that these different parts can be ascertained by computation ; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration, and what upon the other, like every other questionable fact, should be settled by the jury upon the evidence. This can never operate hardly upon the holder of the note, as the presumption of law is in his favor as to the whole note ; and the burden is upon the defendant to show to what extent the note is without consideration. Suppose a father proposes, upon his son’s going into business, to aid him by an advance of several thousand dollars, and for that purpose gratuitously offers him his note for that sum ; but as his son had performed services to the value of a few dollars, for which no price was agreed, upon giving his note, the father, intending to cancel and discharge that and all other claims, takes a general receipt for all services and other dues, and afterwards, the note not having been negotiated, a suit should be brought on it by the payee against the maker, might not the defendant show the want of consideration by way of defence *pro tanto* ? and yet the amount must be settled by a jury, the evidence of the original agreement not distinguishing between what was payment and what was gratuity.” And see, to the same effect, *Loring v. Sumner*, 23 Pick. 98 ; *Folsom v. Mussey*, 8 Greenl. 400 ; *Stevens v. McIntire*, 14 Maine, 14. In *Forman v. Wright*, 11 C. B. 481, to a count on a promissory note, the defendant pleaded that he “ was indebted to one F. in the sum of £ 10 14s. 11d., and no more ; that the plaintiff fraudulently, deceitfully, and falsely represented to the defendant that there was due from the defendant to F. the sum of £ 32 6s. 10d., and then demanded of, and by

an obligation which it prohibits every one from assuming or discharging.

This illegality may consist, first, in the violation of some positive statute law. As that prohibiting gaming, or issuing of private bills or notes as currency, in some of the States, or work on Sunday. As to this last, it may be observed that the English and the prevailing American rule always was, that contracts made in breach of the Sunday law were void.<sup>(t)</sup> But in Massachusetts the rule formerly was, that the contract, or instrument, — a note of hand, for example, — was valid, but the party was punishable for the offence of making it.<sup>(u)</sup> Now, however, the law in Massachusetts is the same as that above stated.<sup>(v)</sup> So, a contract in violation of the statutes for the prevention of intemperance cannot be enforced,<sup>(w)</sup> or a contract for smuggling, or for compounding felonies. It is an illegality which avoids a contract, if it violates the requirements or prohibitions of a statute, although these are not so expressed, if they are certainly implied; and the general doctrine now is, that an act to which a penalty is annexed is prohibited.<sup>(x)</sup> We do not think it desirable to go into details upon this head, for they must depend upon the fluctuating and very various provisions of the statutes of the several States. Usury, one of the most important among them, we shall discuss in connection with interest.

It may be well to remark here, as particularly applicable to illegalities of this kind, although by no means confined to them, that a contract which is intended to lead to and facilitate a

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means of such representation as aforesaid induced, the defendant to deliver to him the note in the first count mentioned." It was proved, and found by the jury, that the note was obtained by a false representation by the plaintiff that £32 6s. 10d. was due, but that such representation had been made without fraud. *Held*, that the evidence sustained the plea; for that the words "fraudulently and deceitfully" might be rejected, and that the plea was in substance a plea of partial want of consideration. *Cresswell, J.* said: "The decision the court now come to does not in any degree interfere with the doctrine, that a small consideration may sustain a larger promise. Where there is a promise to pay a certain sum, all being, as in this case, supposed to be due, each part of the money expressed to be due is the consideration for each part of the promise and the consideration as to any part failing, the promise is, *pro tanto, nudum pactum*."

(t) See 2 Parsons on Cont., 2d ed., p. 262, *et seq.*

(u) *Geer v. Putnam*, 10 Mass. 312.

(v) *Pattee v. Greely*, 13 Met. 284. See *Barrett v. Hyde*, 7 Gray, 160.

(w) *Doe v. Burnham*, 11 Fost. 426.

(x) See 1 Parsons on Cont., pp. 381, 382.



breach of law, is also void for illegality, unless it produces this effect indirectly and remotely. Thus, if money be lent to a man expressly to game with, and the borrower give his note for it, the note cannot be enforced.<sup>(y)</sup> But it would not be defence enough, that the borrower was known to be a gambler, and that any one lending him money might expect that it would go to the gaming-table, and that this money did go there.

Secondly, the illegality may consist in the violation of the laws of religion, morality, or decency; for the general and fundamental principles of these may be considered as incorporated into the common law. For example, a note for future illicit cohabitation is void.<sup>(z)</sup> So it would be void if for rent of lodgings for the purpose of prostitution.<sup>(a)</sup> A note given for past illegal cohabitation is not void for illegality; for the law does not prohibit any one who has done a great wrong from offering some indemnity for it. But such a note, being a simple contract, cannot be enforced, for the reason that the consideration is entirely passed and executed, such a consideration not being sufficient to support a simple contract. It would be otherwise, if a bond or other contract under seal were given, instead of a note.<sup>(b)</sup>

Thirdly, the illegality may consist in an opposition to public policy; for this the law must always protect. As a contract in restraint of trade, without reasonable limitation of place or time;<sup>(c)</sup> or any contract restraining or preventing marriage, even for a time; or one of that kind known in English law as a contract of marriage brokerage, or brokage; that is, a contract wherein one promises to assist another in accomplishing a marriage, where the promisor has no right of interference, or does interfere or may be supposed to interfere corruptly.<sup>(d)</sup> Contracts to procure offices or votes, or for bribes of any kind, which in some States are expressly forbidden, are void everywhere.<sup>(e)</sup> So

<sup>(y)</sup> *Cannan v. Bryce*, 3 B. & Ald. 179; *M'Kinnell v. Robinson*, 3 M. & W. 434; *Mordecai v. Dawkins*, 9 Rich. 262.

<sup>(z)</sup> *Walker v. Perkins*, 3 Burr. 1568; *Friend v. Harrison*, 2 C. & P. 584.

<sup>(a)</sup> *Girarday v. Richardson*, 1 Esp. 13; *Jennings v. Throgmorton*, Ryan & M. 251.

<sup>(b)</sup> See *Binnington v. Wallis*, 4 B. & Ald. 651; *Gibson v. Dickie*, 3 Maule & S. 463; *Nye v. Moseley*, 6 B. & C. 133; *Beaumont v. Reeve*, 8 Q. B. 483.

<sup>(c)</sup> *Alger v. Thatcher*, 19 Pick. 51. See 2 Parsons on Cont. 253, *et seq.*

<sup>(d)</sup> *Peyton v. Bladwell*, 1 Vern. 240. See 1 Parsons on Cont. 555, 556.

<sup>(e)</sup> *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. 314, 334-336; *Clippinger v. Hephaugh*, 5 Watts & S. 315; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361. See *Horn v. Tontz*, 4 Calif. 321.

are those to suppress evidence, or to interfere in any way with the course of justice, whether within the terms of any statute or not. *(f)* But a note for compounding a strictly private misdemeanor is good at common law; *(g)* and in some of the States this kind of composition is favored and regulated by statute. So a note, after conviction, for the legal costs and expenses of the prosecution, may be good. *(h)* And it is said, that if one sells goods, with the distinct knowledge that an illegal use is to be made of them, but without the promise or purpose of rendering personal aid, a note founded on this contract will be good. *(i)* But this rule cannot be universal, and we should indeed regard it as exceptional, if not doubtful. So if one receives a good bill in substitution for one that is forged, at the request of the forger, it is said to be valid, if there were no stipulation to stifle prosecution for the forgery; *(j)* but the new bill would not be given unless the forged bill were surrendered, and if this were done, such a stipulation would seem to be a necessary implication, for the principal evidence is destroyed.

Wagers generally, now indeed almost universally, are not enforceable contracts; nor could a note in payment of a mere wager be enforced between the parties. *(k)* But they are not illegal, and money paid on them with full knowledge of the facts, although with ignorance of the law, which prevented any legal obligation, could not be recovered back. If, however, the bet or wager was one which itself violated decency, or public policy, as a wager about the sex of any person; or as to their marriage, or having children; or on the result of an election; or of a criminal or perhaps of any trial; — in these cases, not only would the note be void between the parties to it, but, if discharged by payment, the money should be recoverable, unless where this was prevented by the rule that, both

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*(f)* *Nerot v. Wallace*, 3 T. R. 17; *Edgcombe v. Rodd*, 5 East, 294; *Coppock v. Bower*, 4 M. & W. 361; *Swan v. Chandler*, 8 B. Mon. 97; *Clark v. Ricker*, 14 N. H. 44; *Commonwealth v. Johnson*, 3 Cush. 454; *Gardner v. Maxey*, 9 B. Mon. 90; *Hincsburgh v. Sumner*, 9 Vt. 23.

*(g)* *Drage v. Ibberson*, 2 Esp. 643; *Fallowes v. Taylor*, 7 T. R. 475.

*(h)* *Beeley v. Wingfield*, 11 East, 46; *Keir v. Leeman*, 9 Q. B. 394; *Kirk v. Strickwood*, 4 B. & Ad. 421; *Baker v. Townshend* 1 J. B. Moore, 20.

*(i)* *Hodgson v. Temple*, 5 Taunt. 181.

*(j)* *Wallace v. Hardacre*, 1 Camp. 45.

*(k)* See 2<sup>d</sup> Parsons on Cont., 261, 262.

parties being *in pari delicto*, neither could have a remedy against the other.

Under this head of public policy comes that class of cases in which a fraud is committed or attempted against creditors. Thus, if one creditor secures any advantage over the others, which is concealed from them, and then enters into a composition or arrangement, in which they seem to stand on the same ground; or if he has anything given him as an inducement to accede to the composition, and so bring others in; or if there be a bankruptcy, and the consideration be withdrawing or suppressing objection to a certificate or discharge of the debtor; — in any of these cases a note given for such a consideration would be void.<sup>(l)</sup> And if a note be given by a third person, who is indemnified by the debtor, it cannot be enforced against the maker, because it is void from the beginning.<sup>(m)</sup> In England, it was held that, if the creditor of a bankrupt act as commissioner, and take a note for his debt while the commission is going forward, he cannot enforce it, because the maker could not then be considered as a free agent.<sup>(n)</sup> So if a third person pay money for such illegal purpose, and the debtor give him a note therefor, the note cannot be enforced.<sup>(o)</sup>

Trading with an enemy, as we have seen, is illegal, and therefore notes and bills given in the course of such trading should be held void; but a distinction has been taken, and it is said that a bill drawn on an alien enemy is justified by practice, and is legal.<sup>(p)</sup> Certainly it would be if drawn for payment of supplies which it was legal to furnish, as to a cartel or licensed ship.<sup>(q)</sup> The sale of a license, which was once held to be legal,<sup>(r)</sup> was afterwards, by the Supreme Court of the United States, held to be illegal; and a note given for it would be void.<sup>(s)</sup>

(l) *Cockshott v. Bennett*, 2 T. R. 763; *Knight v. Hunt*, 5 Bing. 432; *Bryant v. Christie*, 1 Stark. 329; *Sumner v. Brady*, 1 H. Bl. 647; *Rice v. Maxwell*, 13 S. & M. 289; *Sharp v. Teese*, 4 Halst. 352.

(m) *Bryant v. Christie*, 1 Stark. 329.

(n) *Haywood v. Chambers*, 5 B. & Ald. 753.

(o) *Bryant v. Christie*, 1 Stark. 329.

(p) *United States v. Barker*, 1 Paine, C. C. 156.

(q) *Suckley v. Furse*, 15 Johns. 338.

(r) *Coolidge v. Inglee*, 13 Mass. 26.

(s) *Patton v. Nicholson*, 3 Wheat. 204.

If the consideration be in part illegal, and in part not, it seems that the rule in case of partial failure of consideration does not apply; but the whole contract is tainted and avoided by that part of the consideration which is in violation of law.<sup>(t)</sup> Still, however, although a note on such mingled consideration would be void, the fact of its nullity would leave the parties where they were before, or would be without it. And if any good and legal consideration passed between the parties, a proper action, as for money lent, for example, if that were suitable, might be maintained thereon.<sup>(u)</sup> If a note or bill be given for a consideration which is in part illegal, a new note for the same, or in renewal of the first, is equally void.<sup>(v)</sup> But a new note for that part of the consideration which is legal, is good and valid. And if several new notes are given for the old one, some of the new ones may be taken to be for the legal part, and so valid; especially if they are only adequate to this part, or if the deduction be otherwise favored by circumstances.<sup>(w)</sup>

If a debtor assigns and transfers to a *bona fide* creditor a debt founded upon an illegal consideration, and this illegal debtor gives his note accordingly to the assignee of his creditor, and is discharged by his creditor, the note will be enforced against him; for though the consideration between him and the assignor is illegal, that between him and his promisee is not illegal.<sup>(x)</sup>

Whether, if a note be good in its inception, and afterwards, by sundry transfers, it reaches a *bona fide* and innocent holder for value, he is prevented from enforcing it against the maker, in consequence of one of the intervening transfers being for an illegal consideration, may not be quite certain. It has been said, that if the indorsements are blank, the holder may fill an earlier one to himself, and so recover; but if they are in full, or he is for any reason obliged to derive his title through the illegal transfer, he cannot sue.<sup>(y)</sup> We think, that in either case, and equally, this illegal transfer is no bar or defence whatever. Indeed, it

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(t) *Scott v. Gillmore*, 3 Taunt. 226.

(u) *Utica Ins. Co. v. Kip*, 8 Cowen, 20; *Robinson v. Bland*, 2 Burr. 1077.

(v) *Chapman v. Black*, 2 B. & Ald. 588; *Wynne v. Callander*, 1 Russ. 293; *Preston v. Jackson*, 2 Stark. 237.

(w) *Hubner v. Richardson*, Bayley on Bills, 2d Am. ed., 570; *Crookshank v. Rose* 5 C. & P. 19.

(x) *Bowen v. Doggett*, 2 Nott & McC. 127.

(y) See Story on Prom. Notes, § 193.

might be difficult to see why the very indorsee for illegal consideration might not sue the maker, if his indorser had an unquestionable claim, and had voluntarily passed the paper from himself to this indorsee. The indorsee cannot in such a case sue the indorser; but we incline to think that he may, by the indorser's title, sue a previous party.<sup>(z)</sup>

Where notes are made void by express statute, they cannot become good in the hands of subsequent holders; and upon no such note can a subsequent holder have a valid claim against the maker; but if he holds the note for value and in good faith, he may have a valid claim against his own indorser, either as the maker of a new note or the drawer of a new bill, or else upon the consideration which passed between them.<sup>(a)</sup>

## SECTION IV.

### OF TRANSFERS FOR ANTECEDENT DEBTS, OR FOR SECURITY.

IN all cases where the note is not made void by law, but is void as between the parties to it, for want, or failure, or illegality of consideration, it becomes a good note or bill, as against all parties, in the hands of a subsequent holder, provided the note or bill was indorsed over before it was dishonored, and provided also it was indorsed over for a sufficient consideration. The first of these, relating to the time when the indorsement must be made, will be considered hereafter. In regard to the second, there is some conflict and uncertainty as to whether either pay-

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<sup>(z)</sup> See *Knights v. Putnam*, 3 Pick. 184; *Parr v. Eliason*, 1 East, 92; *Daniel v. Cartony*, 1 Esp. 274. But see *Lowes v. Mazzaredo*, 1 Stark. 385. This question usually arises in cases of usury, and we shall consider it more fully when we come to treat of that subject.

<sup>(a)</sup> In *Edwards v. Dick*, 4 B. & Ald. 212, in an action against the drawer of a bill of exchange, it was *held* to be no defence that the bill was drawn and accepted for a gaming-debt; it having been indorsed over by the drawer for a valuable consideration to a third person, by whom the action was brought. So in *Johnston v. Dickson*, 1 Blackf. 256, in an action by the *bona fide* assignee of a promissory note against the assignor, it was *held* to be no defence that the note was originally given by the maker to the defendant for an illegal consideration. We shall consider this and other questions relative to the rights of a *bona fide* holder more fully in the chapter on that subject.

ment of, or security for, a previously existing debt, is such a consideration as protects the indorsee or holder.

The general question presents itself under three aspects. One, where negotiable paper is received in payment of an antecedent debt. Another, where it is received as collateral security for an antecedent debt. A third, where it is received as collateral security for a debt or contract which is simultaneous with the transfer of the paper. The question arises in no other cases, for if negotiable paper be indorsed and given outright for a debt contracted at the time, or in pursuance of a contract then executed, this is certainly a valid consideration; and the real question is, whether only this constitutes such a consideration.

The doctrine, that none of the three considerations above mentioned are sufficient, rests upon two grounds, which are quite distinct. One of these is, that the transferee of the paper, as he gives for it no new consideration, is not injured by losing it; or rather, that if it be taken away, he has all that he had before he received it; and consequently his title or interest is no better than his indorser's, and whatever defence a prior party could make against that indorser, the same may now be made against him; and if it be made successfully, and he loses the paper, he falls back on the debt due to him from the indorser, which is just as good as it was before.

The other objection is, that none of these three transactions is within the original purpose or true function of negotiable paper. Such paper, it is held, is made, in the first instance, for goods bought, or otherwise on a bargain simultaneous with it; and afterwards it may be negotiated by the payee, that is, given by him in a transaction like that in which he received, sold, or discounted it, in either of which cases the property passes absolutely for a present consideration. And anything else than this is irregular; is not a business transaction; no proper negotiation of negotiable paper, and no such use of that paper as is contemplated by the peculiar principles or privileges of negotiable paper; and therefore these principles or privileges do not attach to it, but it is open in the hands of the assignee to all the defences which could have been made against it, had it continued in the hands of the assignor.

We very much doubt the adequacy of either of these reasons, in either of these cases. As to the first reason, it may sometimes

be applicable in part, but, as we should suppose, very seldom. We have already seen, that a note indorsed and given for an antecedent debt is, under some circumstances at least, certainly good ; and where it constitutes an absolute payment of that debt, it must unquestionably be so. But, in general, we suppose it would be very seldom true in fact, that a note indorsed and given for an antecedent debt, as security or otherwise, or as security for a simultaneous debt, can be withdrawn or annulled, and leave the party receiving it as well situated as before. He has, it is true, his whole claim against the transferrer ; but he does not hold it under so favorable circumstances. In the great majority of cases, the transfer is in execution of a bargain, by which something is gained by the transferrer ; either delay or forbearance, or further credit, or the giving up by the transferee of other means, or declining to use other opportunities of indemnity or security. If the rule was confined to those cases to which it is strictly applicable, we apprehend that it would be found to have a very limited operation. It would be one thing to hold, that an indorsee of negotiable paper, who can surrender it and be in all respects as well situated as if he had not taken the paper, should be open to the defences available against his indorser. But it would be a very different thing to hold, that all indorsees for an antecedent debt, or for collateral security, are in this position.

As to the other reason, that these are not regular business transactions, or, as is sometimes said, that these transfers are not made in due course of business, we think the supposition on which the reason rests to be erroneous. Such transactions now constitute a large part of the use which is made of negotiable paper. Even bank-bills, where it is desired to withhold them for a time from circulation, are sometimes pledged as security. This is seldom a "regular," or perhaps a proper transaction ; but the objections to be urged against it are grounded upon the especial nature and purpose of this kind of negotiable paper, and do not attach to common bills or notes. It is certainly very common to offer notes for discount at a bank, and other notes as a security for them ; and we cannot see what objection can lie against this transaction, or any ground for saying that the bank should be open to defences against the notes they take as security, which they are not open to as to those which they discount. So far from holding that transfer for security is not a regular



disposition of a negotiable note, we think it one extremely common in point of fact, wholly unobjectionable in itself, and often extremely convenient to all parties. And the law could not decide that this was an improper use of negotiable paper, and withdraw its protection on this ground, without impairing the utility of this paper, and throwing a useless hinderance in the way of mercantile transactions. It is, therefore, our conclusion, that when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers (not affected by peculiar circumstances) will be held to be regular, and to rest upon a valid consideration. It is now quite well settled, that in the first of the three cases before stated, namely, where negotiable paper is received in payment and extinguishment of a pre-existing debt, the holder is entitled to protection. (b)

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(b) This is held in the following cases : *Percival v. Frampton*, 2 Crompt. M. & R. 180 ; *Poirier v. Morris*, 2 Ellis & B. 89 ; *Swift v. Tyson*, 16 Pet. 1 ; *Riley v. Anderson*, 2 McLean, 589 ; *Varnum v. Bellamy*, 4 McLean, 87 ; *Pugh v. Durfee*, 1 Blatchf. C. C. 412 ; *Homes v. Smyth*, 16 Maine, 177 ; *Norton v. Waite*, 20 Maine, 175 ; *Adams v. Smith*, 35 Maine, 324 ; *Williams v. Little*, 11 N. H. 66 ; *Atkinson v. Brooks*, 26 Vt. 569 ; *Chicopee Bank v. Chapin*, 8 Met. 40 ; *Blanchard v. Stevens*, 3 Cush. 162 ; *Brush v. Scribner*, 11 Conn. 388 ; *McCasky v. Sherman*, 24 Conn. 605 ; *Youngs v. Lee*, 18 Barb. 187, 2 Kern. 551 ; *White v. Springfield Bank*, 1 Barb. 225, 3 Sandf. 222 ; *Bank of Sandusky v. Scoville*, 24 Wend. 115 ; *Bank of St. Albans v. Gilliland*, 23 Wend. 311 ; *New York Marbled Iron Works v. Smith*, 4 Duer, 362 ; *Ferdon v. Jones*, 2 E. D. Smith, 106 ; and see cases in note *d, infra* ; *Walker v. Geisse*, 4 Whart. 252, 258 ; *Bush v. Peckard*, 3 Harring. 385 ; *Reddick v. Jones*, 6 Ired. 107 ; *Bond v. Central Bank*, 2 Ga. 92 ; *Bank of Mobile v. Hall*, 6 Ala. 639 ; *Pond v. Lockwood*, 8 Ala. 669 ; *Barney v. Earle*, 13 Ala. 106 ; *Carlisle v. Wishart*, 11 Ohio, 172, overruling *Riley v. Johnson*, 8 Ohio, 526 ; *Bostwick v. Dodge*, 1 Doug. Mich. 413 ; *Bertrand v. Barkman*, 8 Eng. Ark. 150. In *Williams v. Little*, 11 N. H. 66, *Parker, C. J.* said : " The party who takes a negotiable note by indorsement *bona fide* before it is payable, in payment of a precedent debt, and discharges that debt, without notice of any defence existing against the note, has as meritorious a case as he who receives the note in payment for goods sold at the time. *Townsley v. Sumrall*, 2 Pet. 170, 182. If it be said that the one parts with his property upon the faith of the promise contained in the note which is received in payment for the goods, it may be answered, that the other, giving credit to the note, parts with and discharges an obligation to pay money, which is, in contemplation of law, property of quite as high a character. He cannot, after such payment and discharge, maintain an action upon the debt he has thus discharged, merely because the maker of the note he received in payment might have had some defence against it in the hands of the payee from whom he received it. There is a sufficient consideration. He has parted with a right. Something more is necessary to enable him to recover his debt which he has surrendered. He may be restored to his right to recover the amount of his debt, if the maker avoids the note in his hands by a defence which arose prior to the indorsement. But the holder, having thus parted



In New York it was at one time held that the receiving of a note in payment merely of an existing debt was not enough, without giving up other security.(c) But the rule now seems to be otherwise.(d)

It may be remarked, that when negotiable paper is received in payment of a debt, it may be received as absolute payment, and in extinguishment of the debt, or it may be received as conditional payment, namely, as payment, provided it shall turn out productive, upon the use of due diligence. In two or three of

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with his property, on the faith of a promise which the maker had made negotiable, and which bore no marks of dishonor, the question recurs why he has not as good and meritorious a title as he who had parted with merchandise, or incurred responsibilities upon a similar consideration. If the holder may, upon a failure to recover the note in the one case, be remitted to his original right, and recover his debt against the indorser, he may in the other recover back his merchandise, or its value, or the money he has paid. Nor are we aware of any policy which should lead to such a distinction. The payment of a debt is, or ought to be, as much a commercial transaction as a sale of goods, or a loan of money. If it is in the usual course of trade to purchase, it ought also to be in the usual course of trade and commercial dealing to pay."

(c) See *Francia v. Joseph*, 3 Edw. Ch. 182; *Spear v. Myers*, 6 Barb. 445; *Goldsmid v. Lewis Co. Bank*, 12 Barb. 407; *Rosa v. Brotherson*, 10 Wend. 85, commented on and explained in *Smith v. Van Loan*, 16 Wend. 659. So held in Tennessee. *Vatterlien v. Howell*, 5 Sneed, 441; *Nichol v. Bate*, 10 Yerg. 429. In the following cases, other security being given up, the holder was held entitled to recover. *Smith v. Van Loan*, 16 Wend. 659; *Bank of Salina v. Babcock*, 21 Wend. 499; *Mohawk Bank v. Corey*, 1 Hill, 511.

(d) See cases cited *supra*, note b. In *Youngs v. Lee*, 18 Barb. 187, 192, the court said: "The mere discharge of an antecedent debt is a valuable consideration." In the Court of Appeals, 2 Kern. 551, the case was put on this ground: "In the case before us, the note was received in extinguishment of a demand upon a note not yet due, and the note was delivered up. The surrender, upon a consideration of a security *not due*, extinguishes the security." In *Stettheimer v. Meyer*, 33 Barb. 215, it was held that it made no difference that the debt was overdue, if the evidence of the indebtedness, or a security therefor, was at the time of taking the note given up. In *Farrington v. Frankfort Bank*, 24 Barb. 554, a person was induced, by false and fraudulent representations of the drawer of bills of exchange, to indorse the same for his accommodation, and the bills were therefore delivered to the cashier of a bank which then held protested drafts drawn by the same drawer on the same drawees. There was no agreement between the drawer and the cashier that the new drafts should be received in payment of the protested drafts, but they were procured, and delivered to the cashier with the intention that they should be held as additional and collateral security to the protested bills. The new drafts were subsequently passed to the credit of the drawer on the books of the bank, and he was charged with the protested bills, and the latter were stamped with the cancelling-iron of the bank, but still remained in its possession. It was held that the bank was not a *bona fide* holder. See also *Payne v. Cutler*, 13 Wend. 605; *Clark v. Ely*, 2 Sandf. Ch. 166; *Fulton Bank v. Phoenix Bank*, 1 Hall, 562; *Stewart v. Small*, 2 Barb. 559.

our States, as Massachusetts and Maine, the presumption is, that it is taken as absolute payment ; but in England and in most of our States the presumption is, that it is taken as conditional payment. To what extent any of our courts would make a distinction between these two cases, holding that one who takes a note as absolute payment is a holder for value, and that one who takes it as conditional payment is not, is left in great doubt and obscurity by the cases. As to the second case stated in the text, namely, where negotiable paper is received as collateral security, of an antecedent debt, the authorities are much less harmonious. In England, it appears to be settled that such a holder is entitled to protection.(e) It has been so held, also, by the Supreme Court of the United States.(f) The same doctrine, it seems, is held in Massachusetts and in some other States.(g) In Vermont it has been held, that one to whom a bill of exchange is indorsed as collateral security for an antecedent debt, is entitled to recover against an accommodation acceptor, not known to him to be such when the bill was taken by him.(h) In other

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(e) *Percival v. Frampton*, 2 Crompt. M. & R. 180 ; *Poirier v. Morris*, 2 Ellis & B. 89. See on this subject the chapter on Payment by Bill or Note.

(f) *McCarty v. Roots*, 21 How. 432. See *dicta* in *Swift v. Tyson*, 16 Pet. 1. In *Goodman v. Simonds*, 20 How. 343, at the time the note in suit was taken, collateral securities previously given were surrendered, and further time given. It was held, that, whatever the decision of the court might be on the general question, these facts constituted the assignee a holder for value.

(g) *Chicopee Bank v. Chapin*, 8 Met. 40 ; *Blanchard v. Stevens*, 3 Cush. 162 ; *Gardner v. Gager*, 1 Allen, 502 ; *Le Breton v. Pierce*, 2 Allen, 14 ; *Gibson v. Conner*, 3 Ga. 47 ; *Savings Bank v. Bates*, 8 Conn. 505 ; *Bank of the Republic v. Carrington*, 5 R. I. 515 ; *Bank of Charleston v. Chambers*, 11 Rich. 657 ; *Smith v. Hiscocks*, 14 Maine, 449 ; *Valette v. Mason*, 1 Smith, Ind. 89, 1 Cart. 288 ; and *dicta* in *Payne v. Bensley*, 8 Calif. 260 ; *Allaire v. Hartshorne*, 1 N. J. 665. The security must, however, be given for a debt which can be identified. *Merriam v. Granite Bank*, 8 Gray, 254.

(h) *Atkinson v. Brooks*, 26 Vt. 569. *Redfield*, C. J. stated the following exceptions as based upon good sense, and perhaps sustained by authority : — “ 1. A note or bill negotiated in security for a debt not yet due, is not upon sufficient consideration, ordinarily, unless the creditor wait in faith of the collateral after his debt becomes due. 2. If the debtor is notoriously insolvent before the note or bill is negotiated as collateral security, it is said the creditor can only stand upon the rights of his debtor. 3. If a note or bill is taken merely to collect for the debtor, to apply when collected, the creditor not becoming a party by indorsement, so as to be bound to pursue the rules of the law merchant in making demand of payment and giving notice back, the holder is merely the agent of the owner. *De La Chaumette v. Bank of England*, 9 B. & C. 208 ; *Allen v. King*, 4 McLean, 128. 4. So, too, probably, if it were shown positively that the holder gave no credit to the indorsed bill, and did in no sense conduct differently

States it is held that the taking of a note as collateral security for a pre-existing debt, without more, will not place the taker in the situation of a holder for value, so as to protect him against the equities subsisting between the original parties to the note; but it is otherwise if there is a new and distinct consideration, as if time was given, in consideration of obtaining the note as security for the debt. For the giving of time would be a present and a valuable consideration, and a pledge on these terms would be the same as a pledge for money paid down.(i) In the third case stated, namely, where one receives a bill or note as collateral security for a debt contracted at the time, it is quite well settled that he is entitled to protection against equities.(j)

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on that account, he could not be regarded as a holder for value." This case is doubted in *Austin v. Curtis*, 31 Vt. 64.

(i) *Petrie v. Clark*, 11 S. & R. 377; *Kirkpatrick v. Muirhead*, 16 Penn. State, 117; *Clark v. Ely*, 2 Sandf. Ch. 166; *Bank of Poughkeepsie v. Hasbrouck*, 2 Seld. 216, 230; *Prentiss v. Graves*, 33 Barb. 621; *Ontario Bank v. Worthington*, 12 Wend. 593; *Wardell v. Howell*, 9 Wend. 170; *Stalker v. M'Donald*, 6 Hill, 93; *Bertrand v. Barkman*, 8 Eng. Ark. 150; *Jenness v. Bean*, 10 N. H. 266; *Prentice v. Zane*, 2 Grat. 262; *Cullum v. Branch Bank*, 4 Ala. 21; *Roxborough v. Messick*, 6 Ohio State, 448; *Cook v. Helms*, 5 Wisc. 107; *Goodman v. Simonds*, 19 Misso. 106. In *Fenouille v. Hamilton*, 35 Ala. 319, it was also held, that the fact that the holder afterwards grants indulgence or forbears to enforce his remedies for the collection of his debt, when it is not shown that such indulgence or forbearance was an element of the contract by which he acquired the paper, does not render him a holder for value. In the following cases the giving up other security was held sufficient to enable the holder to recover. *Goodman v. Simonds*, 20 How. 343; *Fenby v. Pritchard*, 2 Sandf. 151; *Payne v. Bensley*, 8 Calif. 260; *Allaire v. Hartshorne*, 1 N. J. 665; *Robbins v. Richardson*, 2 Bosw. 248; *Depeau v. Waddington*, 6 Whart. 220. If a person takes a note as collateral, and not only does not give any other consideration, but retains other security which he before held for the debt, it has been held that he is not a *bona fide* holder for value. *Mickles v. Colvin*, 4 Barb. 304.

(j) Thus, in *Collins v. Martin*, 1 B. & P. 648, where A deposited bills indorsed in blank with B, his banker, to be received when due, and the latter raised money upon them by pledging them with C, another banker, and afterwards became bankrupt: it was held, that A could not maintain trover against C for the bills. So in *Munn v. M'Donald*, 10 Watts, 270, it was held, that if the payee of a promissory note, indorsed by himself and subsequent indorsers, delivers it to his creditor as collateral security for a debt then created on the faith of such indorsements, without notice of any equity between the maker and payee, such maker cannot defend himself by showing failure of consideration as between him and the payee. And see, to the same effect, *Watson v. Cabot Bank*, 5 Sandf. 423; *Williams v. Smith*, 2 Hill, 301; *Griswold v. Davis*, 31 Vt. 390; *Ferdon v. Jones*, 2 E. D. Smith, 106. So if it be taken for advances to be made. *Bancroft v. McKnight*, 11 Rich. 663. In *Fenby v. Pritchard*, 2 Sandf. 151, it was held, that on a sale on credit, to be secured by notes as collateral, not

To the general rules which we have just stated, there are undoubtedly exceptions, and among them are such cases as on their own facts and merits come under the influence of a different principle. The inquiry in every case is whether the particular transaction is within what is properly meant by the negotiation of negotiable paper.<sup>(k)</sup>

If a note be indorsed and delivered for the purpose of collection, with directions to apply the proceeds, when collected, in payment of a debt due to the indorsee from the indorser, it seems that the indorsee will be subject to the same defences as his in-

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yet due, the receipt of the collaterals five days after the delivery of the goods makes the seller a *bona fide* holder of the notes for a valuable consideration, so as to protect him against any defence which the maker of the notes had against the buyer of the goods. The only cases opposed to this view are *Jenness v. Bean*, 10 N. H. 266, and *Williams v. Little*, 11 N. H. 66, in which it is held, that, where a note is indorsed as collateral security, the general property remaining in the indorser, the indorsee takes it like a chose in action not negotiable, subject to all defences to which it would be subject in the hands of the indorser at the time when notice is given of the indorsement; and it makes no difference whether it is indorsed as security for an existing debt, or value received at the time. But in the later case of *Clement v. Leverett*, 12 N. H. 317, where a principal accepted bills of exchange, drawn on him by his agent, payable to the order of the agent, who agreed to get them discounted for the benefit of the principal; and the agent, assuming to be the owner of the bills, pledged them to a *bona fide* holder, to secure money borrowed for his own use, it was held, that the principal, having enabled the agent to hold himself out as owner, was bound by the pledge. We are not able to see very clearly how this case can be reconciled with the two former.

(k) See *Bay v. Coddington*, 5 Johns. Ch. 54, 20 Johns. 637. In this case, one R. having, as agent of B., received negotiable notes to be remitted to B., delivered them to C. as security against responsibilities as indorser of certain accommodation notes of R., who had then stopped payment and become insolvent, but on which notes of R., C. had not then become chargeable. Held, that though C. had no knowledge that the notes so deposited with him belonged to B., but believed R. to be the true owner of them, yet he was not entitled to hold them, as against B., the lawful owner, but was accountable to him for the amount, with interest. *Kent*, C. said: "The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes. They were received from R. & S., and after they had stopped payment and had become insolvent within the knowledge of J. & C. C., and were seized upon by the Coddingtons, as *tabula in naufragio*, to secure themselves against contingent engagements previously made for R. & S., and on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration, within the meaning or within the policy of the law." We are not aware that this decision has ever been questioned. And see, to the same effect, *Bank of Mobile v. Hall*, 6 Ala. 639; *Andrews v. McCoy*, 8 Ala. 920; *Bertrand v. Barkman*, 8 Eng. Ark. 150.

dorser For until the note is collected, he holds it merely as agent or trustee of his indorser.(l)

It is universally conceded that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it, either in payment, or as collateral security for an antecedent debt, and the maker will have no defence.(m)

In this chapter we have treated specifically only of negotiable paper. But what has been said applies equally to a promissory note not payable to order or bearer, and therefore not negotiable, with only those qualifications and exceptions which are made necessary by the fact, that a non-negotiable note cannot be indorsed, and therefore no person can acquire the rights of an indorsee.

Whether the presumption of consideration extends to a note or bill which is not negotiable, cannot be positively stated from the authorities. If the words "value received," or any similar or equivalent words, are used, they would undoubtedly be regarded as evidence of consideration. But it is a different question, whether, if no such words are used in a bill or note which is not payable to order or to bearer, a presumption of considera-

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(l) *Solomons v. Bank of England*, 13 East, 135; *De La Chaumette v. Bank of England*, 9 B. & C. 208; *Johnson v. Barney*, 1 Iowa, 531; *Atkinson v. Brooks*, 26 Vt. 584, cited *supra*. See *Allen v. King*, 4 McLean, 128.

(m) *Rutland Bank v. Buck*, 5 Wend. 66; *Grandin v. Le Roy*, 2 Paige, 509; *Lathrop v. Morris*, 5 Sandf. 7; *Mohawk Bank v. Corey*, 1 Hill, 513; *Matthews v. Rutherford*, 7 La. Ann. 225; *Appleton v. Donaldson*, 3 Penn. State, 386; *Boyd v. Cummings*, 17 N. Y. 101; *De Zeng v. Fyfe*, 1 Bosw. 335; *Robbins v. Richardson*, 2 Bosw. 248. In *Kimbrow v. Lytle*, 10 Yerg. 417, A left blank indorsements with B, with a view to aid B in his business and to sustain his credit. No restriction was imposed as to the use to be made of them. B filled up a note with A's indorsement thereon, and passed it to C as security for an existing liability of B. *Held*, that A was liable to C upon such indorsement. Where an indorsement in blank is left with A generally, and without restriction, it is an assent on the part of the indorser, that A may pledge it as security for his existing liabilities, or use it in any other way lawful and necessary for his accommodation and credit. In *Lord v. The Ocean Bank*, 20 Penn. State, 384, *Black, C. J.* said: "The maker of an accommodation note cannot set up the want of consideration as a defence against it in the hands of a third person, though it be there as collateral security merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend, must abide the consequence (12 S. & R. 382), and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way. This was decided, 3 Barr. 381, in a case strongly resembling the present one. Accommodation paper is a loan of the maker's credit, without restriction as to the manner of its use."

tion would exist. The only conclusion to which we are led by the authorities is, that in some of our States this presumption would be denied, and in others, perhaps, admitted.(n)

It is, however, certain that any holder of a non-negotiable note, however numerous may be the transferrers intermediate between himself and the promisee, stands only in the place of the promisee, and has only his rights. Therefore, the presumption of a

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(n) The text-books and the cases say comparatively little about promissory notes not negotiable. Selwyn's *Nisi Prius*, vol. 1, p. 400, defines a promissory note as a promise in writing to pay "A or order, or A or bearer." The 3 and 4 Anne, ch. 9, speaks only of notes in writing, whereby the promisor promises "to pay unto any other person or his order." This statute was passed in 1704. Twenty-four years after, the precise question came before the Common Bench, on demurrer, whether a note, omitting the words "to order," was a promissory note within the statute; and the court held it to be "clearly within the statute." *Burchell v. Slocock*, 2 Ld. Raym. 1545. In *Smith v. Kendall*, 6 T. R. 123, the question of allowing three days' grace on such a note came before the King's Bench, and the counsel for the plaintiff cited many authorities to the point that this was a promissory note within the statute. But Lord Kenyon, in giving his decision, refers only to *Burchell v. Slocock*, but fully confirms that case. Story, in his work on *Promissory Notes*, sect. 9, says: "But if the promise be in writing, and it has all the other requisites, it is not essential to its character as a promissory note that it should be negotiable." And in section 3 he says: "A promissory note is, in contemplation of law, entitled to all the privileges belonging to such an instrument by the Commercial Law as well as by Common Law, without being negotiable." In sections 7 and 181 he states that "promissory notes" import a consideration; but in section 7 he enumerates this presumption as one of the "privileges, benefits, and advantages" given to them "to insure their circulation as a medium of pecuniary commercial transactions." But this reason certainly does not apply to notes not negotiable, because they cannot circulate by indorsement. In *Mandeville v. Welch*, 5 Wheat. 282, *Story, J.*, giving the opinion of the court, says: "In this respect, bills of exchange and negotiable notes are distinguished from all other parol contracts by authorities which are not now to be questioned." He referred to the presumption of consideration; but as it was presented by the case as a question between third parties, this may explain his use of the word negotiable. Generally, when the rule is stated, either in text-books or in adjudged cases, it is said of bills of exchange and promissory notes, without using the word negotiable; and when this word is used, it seems to be a case where only a negotiable note was under discussion. In *Meredith v. Chute*, 2 Ld. Raym. 760, (*nom. Meredith v. Short*, 1 Salk. 25,) Lord Holt applies the rule to a note, of which it is not stated expressly whether it was negotiable or not; but as the note is said in both reports to have been "delivered" to the defendant as the ground of his assumpsit, it may perhaps be inferred, both from this word and from other parts of the case, that the note was not indorsed or negotiable. In *Ridout v. Bristow*, 1 Crompt. & J. 231, the action was on a promissory note "expressed to be payable to the testator twelve months after date," and turned upon the consideration. There is no intimation throughout the case, which is a long one, that the note "was negotiable, unless it be implied in the remark of *Vaughan, B.*, that the note was in the usual form, and like all other notes." But he says this in reference to an attempt by defendant to make it a "mere indemnity note." Through the case, all the counsel and



consideration, or the evidence of a consideration derived from such words as "value received," is open to rebutter, and want or failure of consideration, total or partial, may be proved by the promisor against *any* holder of a note which is not negotiable, to the same extent and in the same way in which it may be proved between immediate parties if the paper be negotiable.

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all the judges speak of the rule as familiar and certain, using no words which would confine it to negotiable notes.

That this presumption of consideration attaches to promissory notes which are not negotiable, seems to have been distinctly held in New York. In *Kimball v. Huntington*, 10 Wend. 675, the Supreme Court say of an instrument in these words, "Due A. B. \$325, payable on demand": "The instrument is a promissory note within the statute, as it contains every quality essential to such paper." And in *Goshen & Minisink Turnpike Road v. Hurin*, 9 Johns. 217, which was assumpsit on a written promise to pay money, the court say: "The note set forth in the declaration is a good promissory note within the statute, though it has not the words 'bearer,' or 'order'"; and afterwards, "It was not requisite that a consideration should be averred, or appear upon the face of the note, for every note within the statute, unless there be something in the note itself to the contrary, imports a consideration; and that presumption stands good until the defendant destroy it." A similar conclusion may perhaps be inferred from *Coursin v. Ledlie*, 31 Penn. State, 506, in which negotiability is held not to be essential to a bill of exchange. See also, *Mitchell v. Rome Railroad Co.*, 17 Ga. 574; *Thompson v. Crutcher*, 26 Misso. 319; *Middlesex Husbandmen, &c. v. Davis*, 3 Met. 133; *Townsend v. Derby*, *id.* 363; *Downing v. Backenstoos*, 3 Caines, 137; *Jones v. Jones*, 6 M. & W. 84.

In *Bristol v. Warner*, 19 Conn. 7, it is distinctly decided that "in this State" a note not negotiable, and not purporting to be for value received, does not imply a consideration. The only authority cited is *Edgerton v. Edgerton*, 8 Conn. 6. In that case, the court so rule, citing no authorities, however, and quoting from Swift's Evidence this passage: "In Connecticut, promissory notes from the earliest periods have been considered as specialties, so far as to import a consideration." The court, after expressing the highest regard for Judge Swift's authority, overrule it on this point. The court evidently construe Swift's words as including non-negotiable notes; but the rule, precisely as he gives it, is given in very many cases. Kent says, "The words 'value received' in a bill or note are unnecessary, because value is implied in every negotiable bill, note, acceptance, or indorsement," (3 Kent, Com. 77,) thus omitting the word "negotiable" when he gives the rule, but using it when he gives the reason for the rule. In *Birleback v. Wilkins*, 22 Penn. State, 26, it is said that "mere possession of non-negotiable paper implies no consideration, and confers no right of action in the holder's name." See also *Barrick v. Austin*, 21 Barb. 241.

As we have already said in the text, we are unable to make a more accurate statement of the law on this subject than that "value received" in non-negotiable paper raises the presumption of consideration; but where neither these words nor others of equivalent import are used, and the instrument contains neither "bearer" nor "order," in some States the presumption of consideration would probably be admitted, and in others denied.

## CHAPTER VII.

## OF THE RIGHTS AND DUTIES OF THE MAKER.

## SECTION I.

## WHERE A PARTY SIGNS AS PRINCIPAL.

WE have already seen that the maker of a note and the acceptor of a bill have nearly the same rights and duties.<sup>(o)</sup> Both are the principal debtors, to be called on before any other parties can be made liable.<sup>(p)</sup> There are, however, some differences, which may be gathered from what is elsewhere said, but may be here briefly stated. While the promise in a negotiable note must be absolute,<sup>(q)</sup> an acceptance may be conditional.<sup>(r)</sup> Possession

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(o) *Supra*, p. 54.

(p) *Blair v. Bank of Tennessee*, 11 Humph. 84; *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 Johns. 248; *Wallace v. M'Connell*, 13 Pet. 136; *Attenborough v. MacKenzie*, Exch. 1856, 36 Eng. L. & Eq. 562. In *Laxton v. Peat*, 2 Camp. 185, Lord *Ellenborough held*, that an acceptor for the accommodation of the drawer was only a surety for the drawer. See also *Collott v. Haigh*, 3 Camp. 281. But the authority of these cases was denied in *Fentum v. Pocock*, 5 Taunt. 192, 1 Marsh. 14; and in *Yallop v. Ebers*, 1 B. & Ad. 698. See also *Price v. Edmunds*, 10 B. & C. 578. *Harrison v. Courtauld*, 3 B. & Ad. 36; *Nichols v. Norris*, id. 41; *Strong v. Foster*, 17 C. B. 201; *Lord v. Ocean Bank*, 20 Penn. State, 384; *Church v. Barlow*, 9 Pick. 547, *Commercial Bank v. Cunningham*, 24 Pick. 270; *Pickering v. Marsh*, 7 N. H. 192; *Murray v. Judah*, 6 Cowen, 484; *Clopper v. Union Bank*, 7 Harris & J. 92; *Lambert v. Sandford*, 2 Blackf. 137; *Anderson v. Anderson*, 4 Dana, 352; *Farmers' & M. Bank v. Rathbone*, 26 Vt. 19; *Yates v. Donaldson*, 5 Md. 389; *Hansbrough v. Gray*, 3 Grat. 356. But see *Parks v. Ingram*, 2 Foster, 283. Courts of equity have been disposed to admit evidence of the actual relations of the parties, when those relations were known to the holder. *Pooley v. Harradine*, 7 Ellis & B. 431, 40 E. L. & E. 96. See *Bank of Ireland v. Beresford*, 6 Dow, 233. *Ex parte Glendinning*, Buck, 517; *Adle v. Metoyer*, 1 La. Ann. 254; *Theobald on Principal and Surety*, 254. The relations of the parties to each other may be shown by evidence. See *Parks v. Ingram*, 2 Foster, 283; *In re Babcock*, 3 Story, 393; *Baker v. Martin*, 3 Barb. 634; *Jones v. Brooke*, 4 Taunt. 464.

(q) *Supra*, c. 3, § 5.

(r) *Infra*, c. 9 § 1.



of a note by the maker affords a presumption in favor of his payment of it: while mere possession by the acceptor raises no such presumption.<sup>(s)</sup> The maker of a note does not by payment affirm the genuineness of the signature of the payee, while the acceptor by his acceptance admits that the signature of the drawer is genuine.<sup>(t)</sup> It is the duty of both to pay to any legal holder, on legal demand, the whole amount of the note or bill, which is then due.<sup>(u)</sup> But they have not the right of paying before the paper is mature, unless by the consent of the holder. If they tender the money before maturity, and it is received, this acceptance of payment is a waiver of the right of the holder to object. But he may reject the tender, and then it is of no effect, either to stop interest or to prevent cost; nor can it be pleaded as a tender.<sup>(v)</sup> And if the maker or acceptor pay negotiable paper before maturity, and it afterwards, before maturity, falls into the hands of an innocent party for value, the maker or acceptor will be held to pay the amount to this innocent holder.<sup>(w)</sup>

Neither is the maker or acceptor bound to pay without presentation of the note.<sup>(x)</sup> It has been said that neither is bound

<sup>(s)</sup> In *Pfiel v. Van Batenberg*, 2 Camp. 439, Lord *Ellenborough* said: "Show that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee, with his name upon them as acceptor. Prove the bills out of the plaintiff's possession accepted, and I will presume that they got back again by payment."

<sup>(t)</sup> *Infra*, c. 10, § 2.

<sup>(u)</sup> *Infra*, c. 12, § 1.

<sup>(v)</sup> *Bac. Abr. Tender (D)*; *Plowd.* 172, 173; *Wade's case*, 5 Rep. 114; *Tillou v. Britton*, 4 Halst. 120; *Kingman v. Pierce*, 17 Mass. 247; *Saunders v. Frost*, 5 Pick. 259.

<sup>(w)</sup> *De Silva v. Fuller*, *Chitty on Bills*, 392; *Burridge v. Manners*, 3 Camp. 193; *Morley v. Culverwell*, 7 M. & W. 174; *Griswold v. Davis*, 31 Vt. 390. So if he takes a release. *Dod v. Edwards*, 2 Car. & P. 602.

<sup>(x)</sup> *Hansard v. Robinson*, 7 B. & C. 90, 9 Dow. & R. 860. In this case Lord *Tenterden* said: "The principle upon which all such actions [on bills of exchange] is founded is the custom of merchants. The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What then is the custom in this respect? It is that the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto*, in his account with the drawer." See *Musson v. Lake*, 4 How. 262; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Freeman v. Boynton*, 7 Mass. 483; *Gilbert v. Dennis*, 3 Met. 495. A distinction has been taken in this respect between

to pay without presentation of the whole note; and hence the holder of only one half of a note or bill, which has been so divided for the sake of security, has been regarded as unable to recover on it; for an innocent holder of the other half would have quite as good a claim; and no promisor can be held liable to pay the amount of his note to two different parties; and therefore not to one, unless that payment will protect him from the other. This question is very fully considered in our chapter on a Lost Bill or Note. In this connection we will only say, that, on the whole, we should state the law thus: The holder of one half of a negotiable bill or note may generally recover upon it the amount of the bill or note, provided he show that he holds it by good title; but in some of our States, and perhaps in all under some circumstances, he would be required to give indemnity to the payer.<sup>(y)</sup> But this question we consider elsewhere.

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negotiable and unnegotiable paper, making delivery to the maker on payment necessary in the former, and unnecessary in the latter. There is also a conflict of authority on the point; the English and some American cases holding the law as stated in the text, while many American cases decide that the holder cannot be compelled to deliver up the note. There are also decisions to the effect that the holder, after tendering adequate security, may maintain an action on the note without presentation. This subject is considered *infra*, Vol. II. ch. 8.

(y) In *Mayor v. Johnson*, 3 Camp. 324, a bank-note payable to bearer was cut in two, and one half sent by mail. The bag containing it was stolen from the mail. Suit being brought on the other half, the plaintiffs were nonsuited. Lord *Ellenborough* said: "It is usual and proper to pay upon an indemnity; but payment can be enforced at law only by the production of an entire note, or by proof that the instrument, or the part of it which is wanting, has been actually destroyed." *Mossop v. Eadon*, 16 Ves. 431, was a bill in equity to compel payment of a promissory note which had been cut in two, one of the parts having been lost. The other part was produced. The bill was dismissed, on the ground that an action might be maintained thereon at law. The note had never been negotiated; therefore this case is neither in conflict with, nor a confirmation of, *Mayor v. Johnson*. But *Mayor v. Johnson* cannot be law, because a half of a bill is not a negotiable instrument, and if it were, the holder of the lost part must have taken it with notice of the existence of the other half, and at his peril. The reason given, that the bank might be liable to pay twice, is, at the best, a very doubtful one. The remedy of the holder, in good faith, of the lost part, would be against the party from whom he received it. For these reasons, the American cases are in direct conflict with *Mayor v. Johnson*. *Hinsdale v. Orange Bank*, 6 Wend. 378; *Armat v. Union Bank*, 2 Cranch, C. C. 180, 2 Nott & M. 471, note; *Bullet v. Bank of Pa.*, 2 Wash. C. C. 172; *Martin v. Bank of U. S.*, 4 Wash. C. C. 253; *Patton v. State Bank*, 2 Nott & M. 464; *Allen v. State Bank*, 1 Dev. & B. Eq. 1; *Bank of U. S. v. Sill*, 5 Conn. 106; *Bank of Va. v. Ward*, 6 Munf. 169; *Farmers' Bank v. Reynolds*, 4 Rand. Va. 186; *Commercial Bank v. Benedict*, 18 B. Mon. 307, *Northern Bank v. Farmers' Bank*, id. 506. But where the notes of a bank had been so severed as to make twelve bills out of eleven, it has been held that the bank is no longer liable on the notes, since the

The owner of a note who demands payment of it may sometimes be unable to produce and present it, because it has been lost or destroyed. Here arises a different and peculiar question, which will be considered hereafter. (z)

If a note be drawn with the intent that it shall be signed by several persons, and one or more of them sign it on a representation by the payee of the party to whom it is to be given, or by an understanding with him that the others will sign it, and they do not, it is not valid against the actual signers; (a) but if the signers, with a knowledge of the facts, waive their right to object, it becomes their note. (b)

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necessary effect of such mutilation is to defraud the bank and to injure the community; and such notes present on their face such unmistakable evidence of fraud and forgery as to amount to notice, or to deter a reasonably prudent man from receiving it in the ordinary course of business. *Northern Bank v. Farmers' Bank*, 18 B. Mon. 506. Whether *Worcester Co. Bank v. Dorchester & M. Bank*, 10 Cush. 488, which decides that a party taking a bank-bill in good faith may recover upon it, although guilty of gross negligence in not ascertaining that it had been fraudulently put into circulation, would cover such a case, *quære*. *Dean v. Speakman*, 7 Blackf. 317, is authority neither way, as the note had never been negotiated. Some of the cases decide that the bank has a right to require indemnity. *Allen v. State Bank*, 1 Dev. & B. Eq. 1; *Bank of Va. v. Ward*, 6 Munf. 169; *Commercial Bank v. Benedict*, 18 B. Mon. 307. In *Farmers' Bank v. Reynolds*, 4 Rand. Va. 186, it was held, that the plaintiff cannot recover interest nor costs, unless he tenders indemnity before bringing the action. In *Armat v. Union Bank*, the bank offered to pay half the value of the bill, but the plaintiff was allowed to recover the full value. In order to recover on such bill or note, the plaintiff must produce one half, and prove ownership of the other. Cases *supra*. The United States Bank gave notice that it would not be responsible for any of its bills which should be voluntarily cut in two, except on production of both the parts. The court in *Bank of U. S. v. Sill*, 5 Conn. 106, in speaking of this notice, say it "is as extraordinary as it is novel, and is probably the first instance of a debtor's undertaking to *prescribe terms* to his creditors." This is only a *dictum*, as the court held that notice to the plaintiff had not been proved. But in *Martin v. Bank of U. S.*, 4 Wash. C. C. 253, the validity of such notice was denied by *Washington, J.*, who said: On what principle can one party to a contract absolve himself from its obligations without the assent of the other? I know of none. If the bank can dictate to the holders of its notes the condition stated in this notice, upon the performance of which, and not otherwise, it would pay them, it might with equal propriety prescribe any other condition, and declare in what case it would pay and in what not.

(z) *Infra*, Vol. II. ch. 9.

(a) *Evans v. Bremridge*, 2 Kay & J. 174, 35 Eng. L. & Eq. 397; *Awde v. Dixon*, 6 Exch. 869; *Hill v. Sweetser*, 5 N. H. 168. See *Smith v. Doak*, 3 Texas, 215; *Martin v. Stribling*, 1 Speers, 23; *Bean v. Parker*, 17 Mass. 591; *Dunn v. Smith*, 12 Smedes & M. 602; *Miller v. Gambie*, 4 Barb. 146. In *Bank of Mo. v. Phillips*, 17 Misso. 29, it was held, that it is no defence for an indorser, that he indorsed the note upon the express condition that it should also be indorsed by another person, when it does not appear that the plaintiff knew the condition.

(b) *Leaf v. Gibbs*, 4 Car. & P. 466.

## SECTION II.

## WHERE A PARTY SIGNS AS SURETY.

ONE may sign a note merely as surety. If he so call himself in the note, he is only a surety as to all parties.<sup>(c)</sup> If two persons sign a joint and several note, and one of them pays the whole and sues the other for contribution, this other may show by evidence that he signed only as surety for the first, who therefore has no claim on him for contribution.<sup>(d)</sup> For the note is not a written contract between the makers, although the language is *prima facie* evidence of their relations to each other; but it is a written contract between them and the payee. This contract is to pay money at a specified time, and on this point, at least, it cannot be varied by parol evidence. On the question whether parol evidence is admissible to show that one who signed a note as a joint, or joint and several maker, was only a surety for his co-maker, in an action by the holder against such surety, the authorities are conflicting and uncertain. It seems to be settled, that where the fact was not known to the holder previous to the maturity of the note, such evidence is inadmissible; but where this relation was known to the holder at the time of entering into the contract, the evidence is admissible in equity. But, at law, it is urged, on the one hand, that this is an attempt to vary the contract; that the parties, having called themselves joint, or joint and several, promisors in the contract, cannot assume a different

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(c) See *Hunt v. Adams*, 5 Mass. 358, 6 Mass. 519, 7 Mass. 518; *Humphreys v. Crane*, 5 Calif. 173; *Bryan v. Berry*, 6 Calif. 394; *Ex parte Wilson*, 3 Mont. D. & De G. 57, *supra*, p. 136. A note may be accepted by one as surety; see *Boyd v. Plumb*, 7 Wend. 309. The signature need not be on the face of the note. *Palmer v. Grant*, 4 Conn. 389; *Marberger v. Pott*, 16 Penn. State, 9. The suretyship is sufficiently indicated by writing the word "surety," or "security," after the signature. *Hunt v. Adams*, *supra*, *Robison v. Lyle*, 10 Barb. 512. See *Perkins v. Goodman*, 21 Barb. 218. As to the immediateness of liability to the payee of parties signing as principal and surety, these words are said to be words of description only. *Harris v. Brooks*, 21 Pick. 195; *Davis v. Barrington*, 10 Foster, 517. See further, *Sisson v. Barrett*, 6 Barb. 199, 2 Comst. 406; *Robison v. Lyle*, 10 Barb. 512; *Apgar v. Hiler*, 4 N. J. 812. The character in which the parties signed is presumed from the face of the note. *Lord v. Moody*, 41 Maine, 127.

(d) See *Harris v. Brooks*, 21 Pick. 195; *M'Gee v. Prouty*, 9 Met. 547; *Lapham v. Barnes*, 2 Vt. 218; *Apgar v. Hiler*, 4 N. J. 812.

relation or character by extraneous evidence. On the other hand, it is contended, that the note does not express the whole contract, since it depends materially upon delivery, and the purposes for which delivery is made; that the terms of the note only offer a presumption of the relation in which the parties stand to each other; that this is a mere collateral fact, which can be proved, and the presumption rebutted, by parol evidence. We consider that the weight of authority and principle is in favor of the admission of such evidence.(e)

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(e) In *Manley v. Boycot*, 2 Ellis & B. 46, an action by the payee of a joint and several note against one of the makers, the defence being that the defendant was in reality a surety, the court held a plea bad, because it did not allege that the note was delivered by the defendant to the plaintiffs, as surety, and that they agreed so to receive it from him. Lord *Campbell*, in delivering the opinion of the court, said: "But cases in which it can be proved that, at the time when a note was made, or a bill was accepted and handed over to the payee, the maker or acceptor being only a surety, the payee, knowing this fact, agreed to receive it from the maker as surety only, may admit of a different construction, and, consistently with our judgment, it may be held in such cases, that the maker or acceptor is discharged, by time being given to the principal debtor." In *Pooley v. Harradine*, 7 Ellis & B. 431, 40 Eng. L. & Eq. 96, the defendant, a joint maker, pleaded, by way of equitable defence, that he signed the note only for the accommodation of the other promisor, and only as his surety; that the note was accepted by the plaintiff upon the express agreement that the defendant should be held only as surety; and that the plaintiff had given time to the principal debtor by a valid agreement, without the defendant's knowledge and consent, and to his prejudice. The plaintiff demurred, and the court held that the plea stated a good equitable defence at law to the action. *Coleridge*, J. said: "In the more recent cases at law, however, the rule in question has apparently been treated as arising out of the original contract with the creditor; and if this was a plea of a legal defence we should probably have felt bound by those authorities, and have left it to a court of error to consider the whole question, taking it into their consideration whether the same rule in such matters ought not to exist in courts of law and equity, and to decide, if there be a difference, what the rule should be. As we are, however, called upon to deal with this case as if we were sitting in a court of equity, we think we ought to decide it according to what we believe to be the doctrine of courts of equity. We give our judgment for the defendant on the present plea, on the ground that it appears to us sufficiently to state that the relation of principal and surety existed between the defendant and the principal debtor *inter se*, and that the plaintiff had knowledge of that fact when the notes were made and received by him, and when he entered into a binding agreement to give time to the principal debtor." We are aware of no authoritative case at law in England which expressly decides the point; though the language used in some cases tends strongly towards rejecting the evidence. See *Strong v. Foster*, 17 C. B. 201; *Hollier v. Eyre*, 9 Clark & F. 45; *Pooley v. Harradine*, *supra*; *Manley v. Boycot*, *supra*; *Price v. Edmunds*, 10 B. & C. 578; *Perfect v. Musgrave*, 6 Price, 111. But it was admitted in two cases at Nisi Prius, — *Hall v. Wilcox*, 1 Moody & R. 58; *Garrett v. Jull*, 1 Selw. N. P., 11th ed., 407. In the following cases the defendant was allowed to show that he signed as surety, and that the plaintiff, having notice, had given time, or relinquished security; nor does it appear that the note was taken with such knowledge, or agreed

And if, of three who sign a note, two, A and B, call themselves sureties, and A pays the note and calls on B, his co-surety, for contribution, this co-surety may show a separate agreement between himself and A, to the effect that he signed at the request of A, who agreed to pay the whole if the principal failed, and not to call on B for contribution.<sup>(f)</sup> And we should apply the same rule if A and B were sureties in fact, but appeared on the note only as joint promisors, or joint and several promisors. But the authorities on this whole subject are conflicting, and leave the law in some uncertainty. It has been held that one who signed a note apparently as principal, but is a surety in fact, within the

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to be so held. *Horne v. Bodwell*, 5 Gray, 457; *Carpenter v. King*, 9 Met. 511; *Harris v. Brooks*, 21 Pick. 195; *Wilson v. Green*, 25 Vt. 450; *Grafton Bank v. Kent*, 4 N. H. 221; *Grafton Bank v. Woodward*, 5 N. H. 99. See *Pain v. Packard*, 13 Johns. 174; *King v. Baldwin*, 2 Johns. Ch. 354; *Herrick v. Borst*, 4 Hill, 650; *Mariners' Bank v. Abbott*, 28 Maine, 280; *Lime Rock Bank v. Mallett*, 42 Maine, 349; *Fowler v. Brooks*, 13 N. H. 240; *Davis v. Barrington*, 10 Foster, 517. In *Wheat v. Kendall*, 6 N. H. 504, it distinctly appeared that the plaintiff bought the note before it became due, without notice of any suretyship, but that he subsequently, and before giving time to the principal, had notice that the defendant was a surety. *Parker, J.* said: "The injury to the surety is the same as if the creditor had possessed the knowledge at the time the note was taken. He could not pay and take up the note within the term of the extended credit, and seek indemnity from his principal as he might otherwise have done. All that justice requires is, that such contract should not prejudice the right of the creditor against the surety until he had notice that he was surety. When he has notice of that fact, all that he is required to do is, not to undertake to continue the liability of the surety by a new agreement with the principal without the assent of the surety. This manifestly imposes no hardship upon the creditor." See *Peake v. Dorwin*, 25 Vt. 28; *Claremont Bank v. Wood*, 10 Vt. 582; *Artcher v. Douglass*, 5 Denio. 509; *Elwood v. Deifendorf*, 5 Barb. 398; *Gahn v. Niemcewicz*, 11 Wend. 312; *Branch Bank v. James*, 9 Ala. 949; *Lime Rock Bank v. Mallett*, 34 Maine, 546; *Dickerson v. Board of Commissioners*, 6 Ind. 128; *Burke v. Cruger*, 8 Texas, 66, 11 id. 694. The burden is on the defendant to prove that the plaintiff had knowledge of the suretyship. *Wilson v. Foot*, 11 Met. 285. The weight of authority in America we conceive to be in favor of the admissibility of the evidence. In Ohio, the evidence is inadmissible, the remedy of the actual surety being only in equity, on the ground that this would constitute no defence to all the plaintiffs. *Farrington v. Gallaway*, 10 Ohio, 543; *Slipher v. Fisher*, 11 Ohio, 299. In Maryland, *Yates v. Donaldson*, 5 Md. 389. So, perhaps, in Connecticut, but this point was not decided. *Bull v. Allen*, 19 Conn. 101; *Orvis v. Newell*, 17 Conn. 97. And in California, *Kritzer v. Mills*, 9 Calif. 21. In *Sprigg v. Bank of Mount Pleasant*, 10 Pet. 257, it was held, that the defendant in an action on a single bill or bond, signed expressly as principal, was estopped from showing that the plaintiff knew him to be a surety. The fact that the surety received part of the consideration from the principal, as a gift, will not make him a joint principal. *Fraser v. McConnell*, 23 Ga. 368. See *Wilson v. Wheeler*, 29 Vt. 484.

(f) *Apgar v. Hiler*, 4 N. J. 812.



knowledge of the holder, and affixes his signature after the names of others as signers are forged upon the note, and while it is in the hands of him for whose benefit it is drawn, so far sanctions and affirms the genuineness of the forged signatures that he cannot take advantage of the fraud in his defence against the holder, unless he shows that the holder was privy to the fraud.(g) But where the surety, after signing the note, intrusted it to a principal to be discounted at a bank, and before presenting it at the bank the principal altered the amount to a larger sum, it was held that the surety was not liable. The principle being, that, where the plaintiff and defendant are equally innocent, the loss must fall on the party who first placed confidence in the fraudulent instrument.(h) If a surety signs a note which shows on its face that it is to be discounted at a particular bank, and which is known to the holder to be drawn for the purpose of raising money in this way, the surety will be discharged by any different negotiation of the note.(i) He has a right to require perfect good faith in all transactions involving his suretyship, whether between the principal and the parties with whom the surety expressly contracts, or between either of them and other persons.(j) Therefore, if a creditor conceal from the surety any bargains or stipulations made before the suretyship is entered into which make the contract more onerous to the principal debtor than it seems to be, this is a fraud which invalidates the suretyship.(k)

The creditor is not obliged to proceed entirely against the principal debtor, even if he be so requested by the surety. The holder is not obliged to give notice to the surety that the principal debtor has failed to pay, and that he is looked to on his suretyship. It is quite certain that mere omission to sue the principal, without request by the surety, will not discharge the surety;(l) not even where, by the delay, the remedy of the

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(g) *Selser v. Brock*, 3 Ohio State, 302. In an action against the surety alone, the plaintiff need not prove the signature of the principal. *Bond v. Storrs*, 13 Conn. 412.

(h) *Agawam Bank v. Sears*, 4 Gray, 95.

(i) *Dewey v. Cochran*, 4 Jones, 184; *Southerland v. Whitaker*, 5 id. 5. See *Smith v. Knox*, 3 Esp. 46.

(j) *Supra*, p. 132, note j, and p. 140.

(k) *Stone v. Compton*, 5 Bing. N. C. 142, 6 Scott, 846; see *Pidcock v. Bishop*, 3 B. & C. 605; *Evans v. Keeland*, 9 Ala. 42; *Selser v. Brock*, 3 Ohio State, 302; *Graves v. Tucker*, 10 Smedes & M. 1; *Watriss v. Pierce*, 32 N. H. 560.

(l) *Freenan's Bank v. Rollins*, 13 Maine, 202; *Townsend v. Riddle*, 2 N. H. 448;



surety is lost.(*m*) And the authorities would lead to the conclusion, that this would be the rule, even where the surety had expressly requested that demand should be made or suit brought against the principal.(*n*) And it is said to make no difference, if the surety offers indemnity.(*o*) But this, which we think the better rule, is not contradicted.(*p*) So it is said a refusal to prosecute a suit against the principal, which has been already commenced, does not discharge the surety.(*q*) But the authorities we cite show that the courts have found some difficulty in determining questions of this kind.(*r*) And we should be in-

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*Baker v. Marshall*, 16 Vt. 522; *Hunt v. Bridgham*, 2 Pick. 581; *Johnson v. Planters' Bank*, 4 Smedes & M. 165; *Humphreys v. Crane*, 5 Calif. 173; *Hartman v. Burlingame*, 9 Calif. 557. See *Orme v. Young*, Holt, 84; *Eyre v. Everett*, 2 Russ. 381; *Heath v. Key*, 1 Younge & J. 434; *English v. Darley*, 2 B. & P. 61; *Combe v. Woolf*, 8 Bing. 156; *Strong v. Foster*, 17 C. B. 201; *Hubbard v. Davis*, 1 Aik. 296; *Naylor v. Moody*, 3 Blackf. 92; *Dehuff v. Turbett*, 3 Yeates, 157; *Thursby v. Gray*, 4 Yeates, 518; *Burn v. Poaug*, 3 Desaus. 596; *Jordan v. Trumbo*, 6 Gill & J. 103; *U. S. v. Simpson*, 3 Penn. 437; *Curan v. Colbert*, 3 Ga. 239.

(*m*) *Townsend v. Riddle*, 2 N. H. 448.

(*n*) *Page v. Webster*, 15 Maine, 249; *Davis v. Huggins*, 3 N. H. 231; *Mahurin v. Pearson*, 8 N. H. 539; *King v. Baldwin*, 2 Johns. Ch. 554; *Nichols v. McDowell*, 14 B. Mon. 6; *Hogaboom v. Herrick*, 4 Vt. 131; *Bellows v. Lovell*, 5 Pick. 307; *Frye v. Barker*, 4 id. 382; *Dennis v. Rider*, 2 McLean, 451; *King v. State Bank*, 4 Eng. 185. See *Manning v. Shotwell*, 2 South. 584; *Pickett v. Land*, 2 Bailey, 608; *Croughton v. Duval*, 3 Call, 69; *Buchanan v. Bordley*, 4 Harris & M. 41; *Pintard v. Davis*, 1 N. J. 632; *Carr v. Howard*, 8 Blackf. 190; *Colerick v. McCleas*, 9 Ind. 245; *Taylor v. Beck*, 13 Ill. 376; *Howard v. Brown*, 3 Ga. 523; *Abercrombie v. Knox*, 3 Ala. 728. *Montpelier Bank v. Dixon*, 4 Vt. 587.

(*o*) *Adams Bank v. Anthony*, 18 Pick. 238.

(*p*) See *Bellows v. Lovell*, 5 Pick. 307; *Beardsley v. Warner*, 6 Wend. 610; *Wright v. Stockton*, 5 Leigh, 153; *In re Babcock*, 3 Story, 393.

(*q*) *Bellows v. Lovell*, 5 Pick. 307.

(*r*) In *Pain v. Packard*, 13 Johns. 174, the court held that neglect by the holder to sue the solvent principal, at the mere request of the surety, and the subsequent insolvency and absconding of the principal, discharge the surety. This was denied by Chancellor *Kent*, in *King v. Baldwin*, 2 Johns. Ch. 554, but was affirmed by the Court of Errors, in the same case, on appeal, 17 Johns. 384, overruling the Chancellor. Although this is now held to be the law in New York, it is subjected to strict limitations. *Warner v. Beardsley*, 8 Wend. 194; see *Row v. Pulver*, 1 Cowen, 246; *Ruggles v. Holden*, 3 Wend. 216; *Huffman v. Hulbert*, 13 Wend. 377; *Valentine v. Farrington*, 2 Edw. Ch. 53; *Merritt v. Lincoln*, 21 Barb. 249. In *Herrick v. Borst*, 4 Hill, 650, *Cowen, J.* said that the doctrine "came into this court without precedent, was afterwards repudiated even by the Court of Chancery, as it has always been held at law and in equity in England, but was restored, on a tie, by the casting vote of a layman." See also *Schroepell v. Shaw*, 3 Comst. 446; *Fuller v. Loring*, 42 Maine, 481; *Bull v. Allen*, 19 Conn. 101. In Pennsylvania the rule of *Pain v. Packard* has been adopted, the want of a remedy in equity in that State being mentioned as a reason. See *Cope v. Smith*, 8 S. & R. 110; *Erie Bank v. Gibson*, 1 Watts, 143; *Marberger v.*

clined to say, that in equity at least, if not at law, there should be an application of the rule established in cases of guaranty and suretyship on bonds, so far, at least, that the surety might have some remedy where he was injured by wanton and inexcusable neglect on the part of the holder.<sup>(s)</sup>

It is a general rule, that if the creditor, with knowledge of the suretyship, makes any binding contract with the principal, without the consent of the surety, which varies the terms of the original undertaking for the performance of which he became responsible, and is prejudicial to him, he is discharged. For the responsibility of the surety rests upon the validity of his original contract; and this, in turn, depends upon the assent of both parties, which is an essential element of every valid contract.<sup>(t)</sup>

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Pott, 16 Penn. State, 9. The request need not be in writing. *Cope v. Smith*, *supra*; *Erie Bank v. Gibson*, *supra*. But it must contain a positive order to sue, with a declaration that the surety will hold himself absolved if it is not complied with. *Greenawalt v. Kreider*, 3 Penn. State, 264; *Gardner v. Ferree*, 15 S. & R. 28. No tender of expenses or stipulation to pay them is necessary, unless required by the creditor. *Wetzel v. Sponsler*, 18 Penn. State, 460. For other cases approving the rule in *Pain v. Packard*, see *Lang v. Brevard*, 3 Strob. Eq. 59; *Goodman v. Griffin*, 3 Stew. 160; *Hancock v. Bryant*, 2 Yerg. 476; *State Bank v. Watkins*, 1 Eng. 123. In Alabama, Arkansas, Georgia, Illinois, Indiana, Missouri, Ohio, Tennessee, Texas, and Virginia, this subject has been regulated by statute. In Louisiana the rule of the Civil Law, allowing the surety to require the creditor to proceed against the principal, prevails. Civ. Code (1838), art. 3015.

In *Clark v. Hill*, cited in *McCollum v. Hinckley*, 9 Vt. 143, the surety was discharged by the neglect of the holder to prove his claim against the insolvent estate of the deceased principal until the claim was barred, and his pretending to have mislaid the note and refusing a tender in bills, the surety having requested the holder to proceed against the estate of the principal. In *McCollum v. Hinckley*, where the holder neglected to prove his claim, but without notice of the death of the principal or request by the surety to proceed, the surety was held to be discharged to the amount which could have been realized out of the estate. These two last cases were bills in equity. In *Bank of Manchester v. Bartlett*, 13 Vt. 315, it was *held* that a mere refusal to proceed against the insolvent estate of the deceased principal, unaccompanied by acts of positive and wilful interference, would not discharge the surety.

<sup>(s)</sup> See *White v. Howland*, 9 Mass. 314; *Oxford Bank v. Haynes*, 8 Pick. 423; *Commerical Bank v. French*, 21 Pick. 486; *Marberger v. Pott*, 16 Penn. State, 9; *Sibley v. McAllaster*, 8 N. H. 389. In *Read v. Cutts*, 7 Greenl. 186, *Mellen, C. J.* said: "No demand of the debt, or notice of its non-payment by the principal, need be proved in an action against such surety in any case." See also *Gibbs, C. J.*, *Orme v. Young*, Holt, 84; *Wright v. Simpson*, 6 Ves. 714; *Sailly v. Elmore*, 2 Paige, 497; *Beebe v. Dudley*, 6 Foster, 249. In California a surety is entitled to demand and notice. *Bryan v. Berry*, 6 Calif. 394. Not, however, unless the suretyship appears on the note. *Kritzer v. Mills*, 9 Calif. 21. Presentment with demand of payment is not necessary. *Bond v. Storrs*, 13 Conn. 412.

<sup>(t)</sup> *Mayhew v. Boyd*, 5 Md. 102; *King v. Baldwin*, 17 Johns. 384; *Watriss v. Pierce*,

We should say that any material variation would be presumed to be prejudicial to the surety ; (u) although it is shown to be not injurious to him.(v) It has been held, on what we deem strong reasons, that, if a note be sued which was given as a collateral security for the performance of a contract by another, it is a good defence by the promisor that the contract has been materially varied without his consent.(w)

If the creditor gives time or forbearance to the principal debtor by a promise which binds him in law, and would bar his action against the debtor, the surety is discharged. For in the first place this essentially varies the terms of the obligation, which ceases to be that for the due discharge of which he became surety. And in the next place the surety holds, as a valuable right, the power of instantly saving himself by suit against the debtor, if he is obliged to pay the debt. If, then, time be given to the debtor, and the surety pays, he loses this right because he does not pay from legal necessity. The debtor may say, "I was not obliged to pay my creditor for three months to come, and why should I pay you?" And thus the creditor has deprived the surety of a right on which he may have depended for his indemnity.(x) But that the promise may have this effect, the fact of suretyship must be known to the creditor at the time he makes

32 N. H. 560 ; *Manufacturers' Bank v. Cole*, 39 Maine, 188. See *Bonar v. Macdonald*, 8 H. L. Cas. 226 ; *Boston H. M. Co. v. Messinger*, 2 Pick. 223 ; *Bethune v. Dozier*, 10 Ga. 235.

(u) See *Loughborough, Ld. Ch.*, *Rees v. Berrington*, 2 Ves. Jr. 540 ; *Eastman, J.*, *Watriss v. Pierce*, *supra* ; *Miller v. Stewart*, 9 Wheat 680.

(v) *Miller v. Stewart*, *supra*. See also *McMicken v. Webb*, 6 How. 292 ; *Mackay v. Dodge*, 5 Ala. 388 ; *Walworth, Ch.*, *Miller v. McCan*, 7 Paige, 451 ; *Nelson, J.*, *Gahn v. Niemcewicz*, 11 Wend. 312 ; *Holmes v. Dole*, Clarke, Ch. 71. See *American Bank v. Baker*, 4 Met. 164 ; *Bangs v. Strong*, 10 Paige, 11, 7 Hill, 250 ; *Comegys v. Booth*, 3 Stew. 14 ; *McWilliams v. Mason*, 6 Duer, 276. But see, *contra*, *Hulme v. Coles*, 2 Sim. 12 ; *Price v. Edmunds*, 10 B. & C. 578 ; *Bell v. Banks*, 3 Scott, N. R. 497 ; *Barker v. M'Clure*, 2 Blackf. 14.

(w) *Brigham v. Wentworth*, 11 Cush. 123.

(x) *Bangs v. Strong*, 10 Paige, 11, 7 Hill, 250 ; *Bower v. Tiermann*, 3 Denio, 378 ; *Horne v. Bodwell*, 5 Gray, 457 ; *Davies v. Stainbank*, 6 De G. M. & G. 679 ; *Dunn v. Spalding*, 43 Maine, 336 ; *Chute v. Pattee*, 37 Maine, 102 ; *King v. State Bank*, 4 Eng. 185 ; *Waters v. Simpson*, 2 Gilman, 570. See *Rees v. Berrington*, 2 Ves. Jr. 540 ; *Orme v. Young*, Holt, 84 ; *Eyre v. Bartrop*, 3 Mad. 221 ; *Lewis v. Jones*, 4 B. & C. 515, note. The doctrine was first introduced in courts of equity. *Gibbs, C. J.*, *Melville v. Glendining*, 7 Taunt. 126. The rule is the same, if the principal was insolvent at the time of the promise. *Huffman v. Hulbert*, 13 Wend. 375.

the promise; (*y*) nor will such knowledge be presumed where he takes a note overdue; (*z*) if the surety assents to the promise, he will not be discharged; (*a*) but assent of one surety will not bind a co-surety. (*b*) If the agreement to give time be without consideration, it does not bind the creditor, and therefore does not discharge the surety. (*c*) The indulgence, to have the effect of discharging the surety, must be for a definite time; (*d*) but this time may be very brief. (*e*) If the consideration for the indulgence be usurious, where such a contract is void by law, the agreement does not discharge the surety; (*f*) and this has been held even where the usury was paid, and the contract executed; (*g*) but that the surety is discharged in this case seems to be the better rule, and to rest upon better authority. (*h*) Part payment before maturity is held to be a sufficient consideration for the promise of indulgence, which promise therefore discharges the surety. (*i*) But payment after maturity is not regarded as a

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(*y*) *Elwood v. Deifendorf*, 5 Barb. 398.

(*z*) *Nichols v. Parsons*, 6 N. H. 30.

(*a*) See *Gray v. Brown*, 22 Ala. 262; *Suydam v. Vance*, 2 McLean, 99; *Solomon v. Gregory*, 4 Harrison, 112.

(*b*) *Crosby v. Wyatt*, 10 N. H. 318. In this case, the defendant, in an action for contribution between co-sureties, claimed his discharge, because time had been given to the principal. The note was given to a bank, which, according to its regular usage, allowed the note to lie over after it became due, on receipt of interest in advance from the principal. *Held*, that this was presumptive assent of the surety to such extension of payment; but that this principle cannot apply to any delay beyond such regular usage. So where the note laid over for two years, under such circumstances, and the principal had become insolvent. *Strafford Bank v. Crosby* 8 Greenl. 191. See *Crosby v. Wyatt*, 23 Maine, 156. Where a note stipulated for its continuance from time to time, the sureties were held, although not consulted in making such continuance. *Reddish v. Watson*, 6 Ohio, 510.

(*c*) *Reynolds v. Ward*, 5 Wend. 501; *Hogaboom v. Herrick*, 4 Vt. 131; *Creath v. Sims*, 5 How. 192; *Varnum v. Milford*, 2 McLean, 74; *Newell v. Hamer*, 4 How. Miss. 684. See *M' Lemoire v. Powell*, 12 Wheat. 554; *Brinagar v. Phillips*, 1 B. Mon. 283.

(*d*) *Board of Police, &c. v. Covington*, 26 Missis. 470. See *Miller v. Stem*, 2 Penn. State, 286, 12 id. 383; *Alcock v. Hill*, 4 Leigh, 622; *Gardner v. Watson*, 13 Ill. 347; *Parnell v. Price*, 3 Rich. 121.

(*e*) *Fellows v. Prentiss*, 3 Denio, 512.

(*f*) *Vilas v. Jones*, 1 Comst. 274; *McComb v. Kittridge*, 14 Ohio, 348.

(*g*) See *Vilas v. Jones*, *supra*.

(*h*) *Kenningham v. Bedford*, 1 B. Mon. 325; *Duncan v. Reed*, 8 id. 382; *Walworth, Ch., Vilas v. Jones*, 10 Paige, 76; *Kyle v. Bostick*, 10 Ala. 589. If usurious contracts are not void at law, the surety is discharged. *Harbert v. Dumont*, 3 Ind. 346; *McComb v. Kittridge*, 14 Ohio, 348.

(*i*) *Whittle v. Skinner*, 23 Vt. 231; *Greely v. Dow*, 2 Met. 176. In this last case

sufficient consideration. *(j)* The receipt of interest in advance, after maturity, has however been held to be a sufficient consideration; *(k)* and it has also been held to be *prima facie* evidence of a valid agreement. *(l)* If the creditor, when he gives time to the principal, expressly reserves his remedy against the surety, the surety is not discharged. *(m)* So if the surety holds full indemnity from the principal, it has been held that he cannot avail himself, by way of defence, of the fact that time has been given to the principal. *(n)* It seems to be otherwise, however, if the indemnity is from a co-surety, who is not a party to the note. *(o)*

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*Shaw, C. J.* stated the general rule thus: "If the holder of the note has contracted to enlarge the time, he is bound by it; whether it is treated as a collateral undertaking upon which the legal remedy is to be sought at law, as in *Dow v. Tuttle*, 4 Mass. 414; or whether the remedy of the promisor is in equity for a specific performance; or whether the contract for an enlargement of the time of payment contains the stipulation that, if violated, it shall enure by way of release; it makes no difference to the surety. The holder of the note has a perfect right to enter into stipulations with the promisor in regard to the time and the mode of payment. Such stipulation, as between them, is a valid and binding contract for further time, bearing directly on the contract, which he had no right to say he did not intend to fulfil, and therefore the surety may avail himself of it as a substantive alteration of the contract, and insist on his discharge." See *Thomas v. Dow*, 33 Maine, 390

*(j)* *Mason v. Peters*, 4 Vt. 101; *Wheeler v. Washburn*, 24 id. 293; *Pabodie v. King*, 12 Johns. 426. See *Jenkins v. Clarkson*, 7 Ohio, 72.

*(k)* *N. H. Savings Bank v. Colcord*, 15 N. H. 119; *Chute v. Pattee*, 37 Maine, 102. See *Blake v. White*, 1 Younge & C. Exch. 420; *Dubuisson v. Folkes*, 30 Missis. 432. *Contra*, see *Harter v. Moore*, 5 Blackf. 367; *Shook v. State*, 6 Ind. 113; *Reynolds v. Ward*, 5 Wend. 501.

*(l)* *Crosby v. Wyatt*, 10 N. H. 318; *N. H. Savings Bank v. Ela*, 11 N. H. 335; *Merrimack Co. Bank v. Brown*, 12 N. H. 320. *Contra*, *Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 Pick. 129; *Freeman's Bank v. Rollins*, 13 Maine, 202; *Mariner's Bank v. Abbott*, 28 Maine, 280. See *Harnsberger v. Kinney*, 13 Grat. 511; *Crosby v. Wyatt*, 23 Maine, 156. An agreement to receive payment in yearly instalments, on a note payable on demand, discharges the surety. *Gifford v. Allen*, 3 Met. 255. Taking the check of the principal, payable at a future day, discharges the surety on a bond. *Bangs v. Mosher*, 23 Barb. 478. For analogous cases, see *Hulme v. Coles*, 2 Sim. 12; *Price v. Edmunds*, 10 B. & C. 578; *Clippinger v. Creps*, 2 Watts, 245; *Okie v. Spencer*, 2 Whart. 253; *Michigan Bank v. Leavenworth*, 28 Vt. 208. *Hart v. Hudson*, 6 Duer, 294.

*(m)* *Viele v. Hoag*, 24 Vt. 46; *Blackstone Bank v. Hill*, 10 Pick. 129. See *Wyke v. Rogers*, 1 De G. M. & G. 408; *Ex parte Harvey*, 4 id. 881; *Nichols v. Norris*, 3 B. & Ad. 41; *Kearsley v. Cole*, 16 M. & W. 128; *Owen v. Homan*, 3 Mac. & G. 378, 4 H. L. Cas. 997; *Ex parte Glendinning*, Buck, 517; *Ex parte Carstairs*, id. 560; *Wagman v. Hoag*, 14 Barb. 232; *Sohier v. Loring*, 6 Cush. 537. *Contra* in Louisiana. See *Gustine v. Union Bank*, 10 Rob. La. 412.

*(n)* *Chilton v. Robbins*, 4 Ala. 223; *Smith v. Steele*, 25 Vt. 427. See *Bradford v. Hubbard*, 8 Pick. 155; *Moore v. Paine*, 12 Wend. 123.

*(o)* *Wilson v. Wheeler*, 29 Vt. 484.

If a surety, who has been discharged by giving time to the principal, afterwards, with knowledge of the facts, and for a new consideration, acknowledge that the original debt is due from him, and agrees to be liable in a stipulation for further delay, he is bound by this agreement, and possibly so, even if he were ignorant of the fact of his discharge, there being no fraud in the transaction.<sup>(p)</sup> And perhaps he may renew his liability by a new promise, without any further consideration, on the ground that his right to be discharged is a personal privilege, which he may waive if he chooses.<sup>(q)</sup> A surrender, by the holder of a note, of collateral security received from the principal, will discharge the surety, either entirely, or *pro tanto*, if made without the assent of the surety. For if the surety pays the note, he is entitled to the benefit of such security, by subrogation.<sup>(r)</sup> So, as a general rule, any fraudulent or deceitful conduct on the part of the creditor, which lulls the surety into a groundless confidence, and prevents him from obtaining indemnity, will operate as a discharge.<sup>(s)</sup>

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<sup>(p)</sup> *N. H. Savings Bank v. Colcord*, 15 N. H. 119.

<sup>(q)</sup> *Parker, C. J., Fowler v. Brooks*, 13 N. H. 420. Declarations by the surety to third persons, that he "expected to pay the note," or that he "should be obliged to pay" it, or "might have to pay" it, do not, of themselves, operate as a new promise. The fact that the surety takes indemnity from the principal without any communication with the creditor, is not a renewal of the promise. *Fowler v. Brooks*, *supra*. See further, *Mayhew v. Crickett*, 2 Swanst. 185.

<sup>(r)</sup> *Baker v. Briggs*, 8 Pick. 122. See *Law v. East India Co.*, 4 Ves. 824; *Commonwealth v. Vanderslice*, 8 S. & R. 452; *Lichtenthaler v. Thompson*, 13 id. 157; *Everly v. Rice*, 20 Penn. State, 297; *American Bank v. Baker*, 4 Met. 164; *Hayes v. Ward*, 4 Johns. Ch. 123; *N. H. Savings Bank v. Colcord*, 15 N. H. 119. But in *Crane v. Stickles*, 15 Vt. 252, *Hibbard, J.* said: "The payee of the note may give up such security as he may have obtained at his own suggestion, without any assistance from the surety, provided he acts in good faith, and only with reference to his own interest." Where the creditor, after judgment on the note against both principal and surety, relinquished the property of the principal seized on execution, and levied on property of the surety, there being no proof of damage to the surety by the relinquishment; it was held that the creditor was not liable to the surety in trespass for the sale. *Fuller v. Loring*, 42 Maine, 481, *Tenney, J.* dissenting. Where the creditor, after judgment against the principal alone, abandoned property seized on execution, it was held that evidence of these facts was admissible to discharge the surety for the amount so abandoned. *Springer v. Toothaker*, 43 Maine, 381. See *Edgerly v. Emerson*, 3 Foster, 555. In *Mayhew v. Crickett*, 2 Swanst. 185, 1 Wils. Ch. 418, Lord *Eldon* said: "I always understood, that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle which prevails both in courts of law and in courts of equity."

<sup>(s)</sup> *Baker v. Briggs*, 8 Pick. 122; *Harris v. Brooks*, 21 id. 195; *Clark v. Hill*,



A surety who pays a note which is due and demandable from the principal promisor, although he pays it without suit, or compulsion, or even demand from the holder, has an immediate claim upon the principal debtor for indemnity.<sup>(t)</sup> And it seems to be quite immaterial in what way the surety extinguishes the creditor's claim.<sup>(u)</sup> If the joint and several note of co-sureties is accepted by the creditor as payment of the original note, they may recover of the principal in a joint action, such a case being an exception to the general rule, that each must sue for the amount paid by him. The exception is placed upon the ground that the payment was a joint act, creating a joint interest.<sup>(v)</sup>

As to the costs which a surety may recover, it seems that he may recover costs of his principal, after a suit against the surety by the holder,<sup>(w)</sup> unless his defence were frivolous, unnecessary, or against the reasonable and honest instructions of his principal.<sup>(x)</sup> This right of the surety to indemnity, springing from

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cited in *McCollum v. Hinckley*, 9 Vt. 143, 147. See *Mactaggart v. Watson*, 3 Clark & F. 525.

(t) *Mims v. McDowell*, 4 Ga. 182. See *Odlin v. Greenleaf*, 3 N. H. 270; *Pitt v. Purssord*, 8 M. & W. 538.

(u) *Hulett v. Soullard*, 26 Vt. 295; *Bonney v. Seely*, 2 Wend. 481. He may recover on a count for money had and received, although he paid in notes, if they were received as payment. *Willie v. Green*, 2 N. H. 333. Or on a count for money laid out and expended. *Pearson v. Parker*, 3 N. H. 366. See *Hommell v. Gamewell*, 5 Blackf. 5. Where the administrator of the principal had successfully defended a suit on the note against him, and the holder afterwards obtained a judgment by default against the surety in the same court; it not appearing that either party knew of the other suit, or that the surety was privy to the administrator's defence; it was *held*, that the surety was not precluded from his right to indemnity from the estate of the principal. *Stinson v. Brennan*. Cheves, 15. Where the administratrix of a surety, having been sued by the holder of the note while it was still valid against the principal, but after the claim against the surety's estate was barred by the statute of limitations, paid the claim under an award; it was *held* that she could maintain a claim for indemnity. *Shaw v. Loud*, 12 Mass. 447. Where the surety, after the discharge in insolvency of the principal, being then first called on, paid the note and sued the principal, he was allowed to recover. *Powell v. Eason*, 1 Moore & S. 68.

(v) *Stewart v. Vaughan*, Rice, 33. See *Pearson v. Parker*, 3 N. H. 366; *Appleton v. Bascom*, 3 Met. 169.

(w) See *Cleveland v. Covington*, 3 Strob. 184; *Rice v. Rice*, 14 B. Mon. 417. *Riddle v. Bowman*, 7 Foster, 236.

(x) *Beckley v. Munson*, 22 Conn. 299; *Cleveland v. Covington*, *supra*. See *Roach v. Thompson*, 4 Car. & P. 194. The surety may recover costs incurred in an action against the principal and surety jointly. *Apgar v. Hiler*, 4 N. J. 812. It seems that he may recover interest on the amount paid. See *Petre v. Duncombe*, 1 Eng. L. & Eq. 320; *Ilsey v. Jewett*, 2 Met. 168. But, in general, he can recover only the



the equitable obligation of the principal to repay the surety, exists wherever the principal's assent to the suretyship may be reasonably inferred, or presumed, and only there; (y) and then it relates back to the time of the original contract of suretyship, as against all subsequent equities. (z)

A surety has, however, no claim against the principal upon which he can bring an action, until the note on which he is surety is due. His contingent liability may, however, be a sufficient consideration for a promissory note from the principal, upon which he may commence a suit, even before the original note is due. (a) As a general rule, whatever discharges the principal discharges the surety. (b) But where one had signed a joint and several note with a married woman, as surety, it was held that her successful plea of coverture was no defence to the surety. (c) Nor will this rule apply to the many cases in which a surety is required, for the very reason that the principal *may* have a defence which will defeat the claim against him. As in the instance just mentioned, where a wife's note is strengthened by a surety, so an infant's note may have a surety who will be held, although the infant make successfully the defence of infancy. (d) And we should say that, if a corporation made a note which they had no legal power to make, sureties on that note would be held. And this might be true, even if the corporation were prohibited by their charter, or by some general statute, from issuing such a note. If, however, the issuing of the note were not only prohibited, but made a legal offence, with a penalty

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amount paid. *Bonney v. Seely*, 2 Wend. 481. Where one of the principals died, it was held that the surety could recover the amount paid of the survivor, deducting the proceeds of whatever collateral security he might have received. *Riddle v. Bowman*, 7 Foster, 236.

(y) *Powers v. Nash*, 37 Maine, 322; *Norton v. Coons*, 3 Denio, 130.

(z) *Barney v. Grover*, 28 Vt. 391. See *Howe v. Ward*, 4 Greenl. 195; *Thompson v. Thompson*, 19 Maine, 244; *Carlisle v. Rich*, 8 N. H. 44; *Choteau v. Jones*, 11 Ill. 300.

(a) See *Swift v. Crocker*, 21 Pick. 241; *Dedman v. Williams*, 1 Scam. 154. It has been said that a surety may have relief in equity as soon as he is endangered. *Taylor v. Heriot*, 4 Desaus. 227; *McKenna v. George*, 2 Rich. Eq. 15.

(b) 1 *Parsons on Cont.* 494; *Theobald on Principal and Surety*, 3. See *Lewis v. Jones*, 4 B. & C. 506, 515, note a.

(c) *Smyley v. Head*, 2 Rich. 590. See also *Maggs v. Ames*, 4 Bing. 470, and *Connerat v. Goldsmith*, 6 Ga. 14.

(d) *Conn v. Coburn*, 7 N. H. 368. See *Kimball v. Newell*, 7 Hill, 116

- attached, the whole paper, with all its names, might then be deemed void. The mere fact that the surety cannot, in any such case, if he pays the note, have an enforceable claim for what he pays against the principal, defeats the holder's claim against the surety.

Payment of the whole amount will of course discharge the surety; but payment of a part, whether by principal or by surety, will not discharge the surety. For the surety is bound equally with the principal for the payment of the whole; and as payment of a part will not discharge the principal, so it will not discharge the surety.(e) Nor will an offer of time which is not accepted.(f) Nor will the taking of a collateral security by the creditor from the principal debtor; for this can only help the surety, who is entitled, on his payment, to the benefit of all such security.(g)

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(e) See *Fitch v. Sutton*, 5 East, 230; *Beaumont v. Greathead*, 2 C. B. 494; *Cotton v. Godwin*, 7 M. & W. 147; *Hesketh v. Fawcett*, 11 id. 356; *Shaw, C. J., Lincoln v. Bassett*, 23 Pick. 154; *Smith v. Bartholomew*, 1 Met. 276; *Wheeler v. Wheeler*, 11 Vt. 60; *Bailey v. Day*, 26 Maine, 88; *McAllester v. Sprague*, 34 id. 296. Payment of a part, by a third party, discharges the debtor. *Welby v. Drake*, 1 Car. & P. 557; *Brooks v. White*, 2 Met. 283. If the holder has commenced a suit against the principal, and the surety tenders the amount due, he must also tender indemnity against costs. *Hampshire Bank v. Billings*, 17 Pick. 87. Part payment before the debt is due is a good consideration. *Wells, J., Lee v. Oppenheimer*, 32 Maine, 253; *Brooks v. White*, 2 Met. 283.

(f) See *Hewet v. Goodrick*, 2 Car. & P. 468; *Badnall v. Samuel*, 3 Price, 521; *supra*, p. 239, note x.

(g) *Twopenny v. Young*, 3 B. & C. 208. See *Burke v. Cruger*, 8 Texas, 66, 11 id. 694; *U. S. v. Hodge*, 6 How. 279; *Stevenson v. Austin*, 3 Met. 474; *Norton v. Soule*, 2 Greenl. 341; *Wade v. Staunton*, 5 How. Miss. 631; *Pring v. Clarkson*, 1 B. & C. 14. Where a party holds two notes against another, one of which is signed by a surety, recovery of the full amount of the other note will not affect his claim on the surety. *Dalton v. Woburn*, 24 Pick. 257. In this last case it was held, that if the creditor recovers judgment on several notes, and the surety on one pays the note in full, and afterwards the creditor receives from the principal the whole amount of the judgment on all the notes, the surety cannot recover back any portion of the money paid by him. In *Lincoln v. Bassett*, 23 Pick. 154, the principal made an assignment to the creditor, for the benefit of all his creditors. The creditor received a dividend during the pendency of a suit by him against a surety. It was held that the suit was not barred by the receipt of the dividend, but that the dividend was to be deducted in estimating the damages. *Shaw, C. J.* said: "The giving of an assignment or other collateral security by the principal is no bar to an action against the surety, unless there be some stipulation to that effect on the part of the creditor. Years may elapse after such an assignment before any money will be realized from the assigned property; in the mean time the obligation is to pay money immediately. Were the surety thus to pay, it might well be held in equity that the creditor should stand as trustee for him for the assigned property. The most favorable view to be taken for the defendant is, that, the

But one surety, on payment of the debt, cannot claim the benefit of security given by a co-surety.(*h*) And if a note be given for the old one, even this may be deemed, if so intended, only as collateral security.(*i*)

If a surety pays money to the creditor under a mistake of facts, supposing them such as would make him liable, when in truth they are not, he may recover the money back from the creditor.(*j*) But if he had knowledge of the facts, and his mistake is one of law, he has no such right.(*k*) The declaration of a surety on a joint note, the principal being insolvent, that he intended to pay the amount, and wished to know how much interest was due, in reply to a proposal by the holder that he should sign a new joint and several note for the amount, does not change the liability of the surety from joint to several, either at law or in equity.(*l*) It has been held that a judgment against principal and surety merges the relations of the parties, so that a defence growing out of the relations existing before the judgment is not available at law afterwards.(*m*) But such a defence is admitted in equity.(*n*) It has however been said, that whatever would be a defence to the surety in equity, is a defence in law.(*o*) A surety, whether this word be attached to his name or not, is bound to any holder in like manner as a principal promisor is held. Thus, if a note be signed A and B, and against B's name is the word *surety*, B may be sued jointly with A, or alone if the note be joint and several, in the same way as if the word *surety* was not there.

creditor being himself the assignee, when the assigned property is reduced to money, it operates by way of payment *pro tanto*."

(*h*) *Bowditch v. Green*, 3 Met. 360.

(*i*) See *Canfield v. Ives*, 18 Pick. 253.

(*j*) *Garland v. Salem Bank*, 9 Mass. 408.

(*k*) *Bean v. Jones*, 8 N. H. 149; *Stevens v. Lynch*, 12 East, 38.

(*l*) *Jones v. Beach*, 2 DeG. M. & G. 886.

(*m*) *Marshall v. Aiken*, 25 Vt. 328; *Herrick v. Orange Co. Bank*, 27 id. 584. *Contra*, *Carpenter v. King*, 9 Met. 511; *Gibson, C. J., Commonwealth v. Vanderslice*, 8 S. & R. 452; *Rice v. Morton*, 19 Misso. 263.

(*n*) See *Storms v. Thorn*, 3 Barb. 314; *Curan v. Colbert*, 3 Ga. 239.

(*o*) *Mariner's Bank v. Abbott*, 23 Maine, 280; *Springer v. Toothaker*, 43 id. 381; *Varnum v. Milford*, 2 McLean, 74. See *Rees v. Berrington*, 2 Ves. Jr. 540; *Samuell v. Howarth*, 3 Meriv. 272; *People v. Jansen*, 7 Johns. 332; *Baker v. Briggs*, 9 Pick. 122.

*Action may be brought against any or all of them as negotiable bill*

SECTION III

OF JOINT MAKERS, AND OF JOINT AND SEVERAL MAKERS.

Two or more persons may sign a note jointly, as all copartners do, and if it begin "We promise," all who sign it are considered as signing it only jointly.<sup>(p)</sup> It is then a joint note, and can be sued only against all; and they are in general joint debtors, and come under the common rule of law in relation to joint debtors. And it has been held that the note is joint, although one of the makers signs as principal, and the other as surety.<sup>(q)</sup> The most important of these rules of law which relate to joint debtors arises from the necessity of suing all.<sup>(r)</sup> Hence, if the plaintiff has released one of the joint debtors, he can maintain no action against the other.<sup>(s)</sup> And the reason

<sup>(p)</sup> *Mayor v. Ripley*, 5 La. 120. See *Palmer v. Stephens*, 1 Denio, 471; *Yorks v. Peck*, 14 Barb. 644; *Shep. Touch.* 375.

<sup>(q)</sup> *Hunt v. Adams*, 5 Mass. 358, 6 id. 519, 7 id. 518; *Palmer v. Grant*, 4 Conn. 389; *Rawstone v. Parr*, 3 Russ. 539, reversing same case, id. 424. A note beginning "I promise," signed by one partner for his co-partners, as "A, for A, B, & C," is the joint note of the firm, not the several note of A, the partner who signed. *Ex parte Buckley*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & C. 407; In the matter of *Clarke*, 1 De Gex, 153; *Galway v. Matthew*, 1 Camp. 403; *Doty v. Bates*, 11 Johns. 544. See *supra*.

<sup>(r)</sup> *Mayor v. Ripley*, 5 La. 120; *Bright v. Hand*, 1 Harrison, 273. See *Robertson v. Smith*, 18 Johns. 459. In *Bovill v. Wood*, 2 Maule & S. 23, the plaintiff omitted to join one of the promisors who had obtained his discharge in insolvency. Lord *Ellenborough* said: "The defendants have a right to require that their co-debtor should be joined with them, and the plaintiffs cannot so shape their case as to strip them of that right, or of the benefit, whatever that may be, of having his discharge stated on the record. The plaintiffs are not at liberty to anticipate in the first instance what may ultimately, perhaps, be a discharge. The practice has ever been to join all the contracting parties to the record; and there is this advantage attending the practice, that it gives the party who is joined notice at the time, and also enables him at any future time to plead judgment recovered on the joint debt, without the help of any averment; and it likewise advances the other defendants one step in the proof necessary in an action by them for contribution." See *Hawkins v. Ramsbottom*, 6 Taunt. 179.

<sup>(s)</sup> *Tuckerman v. Newhall*, 17 Mass. 581. In this case the plaintiffs covenanted with one promisor that they "will forever release," &c., it was held that this must operate as a present release, and the co-promisor was discharged. See also *Brooks v. Stuart*, 9 A. & E. 854, 1 Per. & D. 615; *Cheetham v. Ward*, 1 B. & P. 630; *Myrick v. Dame*, 9 Cash. 248; *Wiggin v. Tudor*, 23 Pick. 434; *Kirby v. Taylor*, 6 Johns. Ch. 242; *De Zeng v. Bailey*, 9 Wend. 336; *Taylor v. Gallaud*, 3 Iowa, 17; *Yates v. Donaldson*, 5 Md. 389; *Bozeman v. State Bank*, 2 Eng. 328; *U. S. v. Thompson*, Gilpin, 614. The rule is the same at equity as in law. *Willings v. Consequa*, Pet. C. C. 301.

of this rule is said to be, that the release is an admission that the debt is paid.<sup>(t)</sup> According to the weight of authority, only a technical release under seal will have this effect, a parol release being insufficient.<sup>(u)</sup> We should say, however, that a parol release made on good and sufficient consideration should have an equal effect. In the cases which deny to a parol release this efficiency, there is seldom any valid consideration. The reasons for the distinctions taken on this subject are not always quite satisfactory.<sup>(v)</sup>

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(t) *Shaw*, C. J., *Pond v. Williams*, 1 Gray, 630; *Savage*, C. J., *Catskill Bank v. Messenger*, 9 Cowen, 37; see *McAllester v. Sprague*, 34 Maine, 296; *Crane v. Alling*, 3 Green, N. J. 423; *Brown v. Marsh*, 7 Vt. 320.

(u) *Pond v. Williams*, 1 Gray, 630; *Shaw v. Pratt*, 22 Pick. 305; *Frink v. Green*, 5 Barb. 455; *Rowley v. Stoddard*, 7 Johns. 207; *Pinney v. Bugbee*, 13 Vt. 623; *Harvey v. Sweasy*, 4 Humph. 449.

(v) In *Tryon v. Hart*, 2 Conn. 120, the defendants pleaded a release to one of them not under seal. The plea was held bad on other grounds, but the distinction between one under seal and one without does not appear to have been noticed. See *Campbell v. Brown*, 20 Ga. 415. In *Benjamin v. McConnell*, 4 Gilman, 536, it was held that a release not under seal, but entered of record and made part of a decree in chancery, was sufficient. *Purple*, J. said: "But it is objected that this release or contract is not under seal, and therefore is ineffectual to bar the action as against Benjamin. Our answer to this is found in the authorities above quoted; that 'if it is a release as to one, it is equally so as to all.' Another is, that it is evidenced by an act which, in legal contemplation, is of higher authority than any instrument under seal, a decree of a court of record, the validity of which cannot be assailed, nor its verity questioned. And thirdly, where a consideration is expressed in a release, or otherwise proved to have passed between the parties, it is, in the opinion of the court, totally immaterial whether the instrument is sealed or otherwise. A seal but imports or furnishes evidence of consideration; and, except in cases where the release is designed to effect a conveyance or transfer of real estate, or some interest in or concerning it which can only pass by deed, may, without infringing any rule of law, be dispensed with." In *Nicholson v. Revill*, 4 A. & E. 675, 6 Nev. & M. 192, it was held that the discharge of one of two joint and several makers, by an agreement to that effect for a consideration, and by erasing his name from the note, discharged the other also. Lord *Denman*, C. J. said: "But we do not proceed on some of the grounds mentioned at the bar, such as the effect of the plaintiff's alteration of the instrument as making it void, or that the defendant thereby lost his right to contribution from the joint makers of the note; nor on any doctrine as to the relation of principal and surety. We give our judgment merely on the principle laid down by Lord Chief Justice *Eyre*, in *Cheetham v. Ward*, 1 B. & P. 630, as sanctioned by unquestionable authority, that the debtor's discharge of one joint and several debtor is a discharge of all. For we think it clear that the new agreement made by the plaintiff with Revill, to receive from him £100 in full payment of one of the three notes, and in part payment of the other two before they became due, accompanied with the erasure of his name from these two notes, and followed by the actual receipt of the £100, was, in law, a discharge of Revill." Independently of the stress laid upon the erasure of the name, this case is an authority for the sufficiency of

A judgment against one joint promisor is a bar to an action against both.(w) But a discharge in insolvency of one joint maker has been held to be no defence to the other.(x) And it may be stated as a settled principle, that a discharge of one joint promisor by operation of law, without the co-operation or assent of the creditor, will not discharge both.(y) And it is now quite well established, at least as a general rule, that a debtor may release one of two joint debtors, and, by an express reservation of his rights against the other, preserve them. And if an action be brought against both, and this release to one be pleaded, a replication that this action is brought against both only to recover of the other has been held good.(z)

Although the word *release* is used, and a seal affixed, if the whole instrument is capable of a construction which would make it only an engagement not to charge that party, and the nature of that contract or any admissible evidence leads to this construction, it will be so construed, because this saves the action.(a) For as a plaintiff may agree not to demand the money of one of two joint debtors, but reserve the right of action; so, if he only agrees not to demand the money, he will be held as intending

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a parol release. In *Milliken v. Brown*, 1 Rawle, 391, it was held that a parol release of one debtor from a judgment against three, discharged all. *Tod*, J. dissenting.

(w) *Ward v. Johnson*, 13 Mass. 148; *Robertson v. Smith*, 18 Johns. 459; *King v. Hoare*, 13 M. & W. 494. The contrary was held in *Sheehy v. Mandeville*, 6 Cranch, 253, but this case appears to have been governed by a local practice in Virginia. See *Tucker, J., Moss v. Moss*, 4 Hen. & M. 303. In Massachusetts an action is now allowed in such a case by statute against such of the joint contractors as were not served with process in the first suit. Gen. Stats. Mass., c. 126, § 15.

(x) *Tooker v. Bennett*, 3 Caines, 4. This is so declared by statute in Massachusetts (Stat. 1838, c. 163, § 7); *Carnegie v. Morrison*, 2 Met. 381; and in England, 3 & 4 Wm. IV., c. 42, § 9.

(y) *Hartness v. Thompson*, 5 Johns. 160; *Robertson v. Smith*, 18 Johns. 459; *Denison, J., Noke v. Ingham*, 1 Wilson, 89; 1 Wms. Saund. 207 a, note; *Wilde, J., Ward v. Johnson*, 13 Mass. 148. See *Tuttle v. Cooper*, 10 Pick. 281. In *Cocks v. Nash*, 4 Moore & S. 162, a joint and several note of two had been given as security for the separate debts of the promisors, one of whom the plaintiff had released. The creditor declared on the note, and also on an account stated. A verdict was directed for the defendant in the count on the note, and for the plaintiff in the count on the account stated, for the amount of the separate debt of the defendant.

(z) *Twopenny v. Young*, 3 B. & C. 211, 5 D. & R. 261; *Lancaster v. Harrison*, 4 Moore & P. 561, 6 Bing. 726; *Solly v. Forbes*, 2 Brod. & B. 38; *North v. Wakefield*, 13 Q. B. 536.

(a) *Solly v. Forbes*, 2 Brod. & B. 38; *Couch v. Mills*, 21 Wend. 424. See *Dean v. Newnall*, 8 T. R. 168.



to reserve this right of action. And it is said to be immaterial whether this agreement not to sue is for a limited time, or never to sue. *(b)* A covenant under seal not to sue a party is not a release, but is construed so as to the covenantee to save circuitry of action, because if judgment were rendered against him in the suit, and he satisfied it, he would have his action on the covenant. *(c)* The mere taking of security from one joint debtor, without otherwise giving up any rights against him, does not discharge the others. *(d)* Part payment by one joint debtor does not discharge all, if the holder does not extinguish the contract. *(e)* But it is not so construed as to the other joint debtor, who may still be sued in an action brought against both. *(f)*

The reason of the rule that a discharge of one is a discharge of all, is not merely technical. One of two who owe a sum jointly owes in fact but half of it, because, if he is made to pay the whole of it, he may recover half from the other by way of contribution; *(g)* but the right of contribution exists only where one pays more than his share of a sum which others were bound and compellable to pay with him, and it is therefore lost when the obligation is taken away from the others. The subject of contribution is considered hereafter. *(h)*

At common law the death of one of two or more joint debtors destroyed his obligation, so that the creditor could not proceed against the representatives of the deceased. And if he recovered the whole from the surviving debtor, or from the representatives of the survivor, as he might, this debtor or his representatives

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*(b)* See *Pinney v. Bugbee*, 13 Vt. 623. The agreement may be by parol, as in *Pinney v. Bugbee*, *supra*; *Harrison v. Close*, 2 Johns. 448; or by deed, as in *Durell v. Wendell*, 8 N. H. 369; *Kirby v. Taylor*, 6 Johns. Ch. 242; *Shotwell v. Miller*, Coxe, 81; *Walmesley v. Cooper*, 11 A. & E. 216.

*(c)* *Durell v. Wendell*, 8 N. H. 369; *Garnett v. Macon*, 2 Brock. 185; *Walmesley v. Cooper*, 11 A. & E. 216.

*(d)* *Bedford v. Deakin*, 2 B. & Ald. 210; *Perfect v. Musgrave*, 6 Price, 111. See also *ante*, p. 135, note *q*.

*(e)* *Ruggles v. Patten*, 8 Mass. 480. See *Hartness v. Thompson*, 5 Johns. 160, where to a suit on a joint and several note one of the defendants pleaded infancy. A verdict rendered in his favor and against the others was sustained.

*(f)* *Hutton v. Eyre*, 6 Taunt. 289; *Garnett v. Macon*, 2 Brock. 185; *Durell v. Wendell*, 8 N. H. 369.

*(g)* *Boardman v. Paige*, 11 N. H. 431; *Owens v. Collinson*, 3 Gill & J. 25; *Burnell v. Minot*, 4 J. B. Moore, 340; *Prior v. Hembrow*, 8 M. & W. 873. See *Harris v. Brooks*, 21 Pick. 195.

*(h)* *Infra*, c. 26, § 7.



could not claim any contribution from the representatives of the debtor dying first. This rule has been changed by statute in nearly, if not quite, all our States. The debt falls upon the representatives. They cannot be made joint defendants with the surviving debtor, or with his representatives; but actions may be brought against both, and if either pays more than his or their due share, contribution may be demanded from the other. In some States the common law has been changed still further by statute, and joint contracts are made several as well as joint.<sup>(i)</sup>

A note may be both joint and several. It is so if the words are, "We jointly and severally promise," &c., or if other words are used which indicate, and perhaps if they permit, such a construction.<sup>(j)</sup> Thus, if the words are, "I promise to pay," and there are many promisors, it is the several promise of each, and the joint promise of all.<sup>(k)</sup> If the note were expressly written, "We severally and not jointly promise," &c., it would probably be held as several only; but we have never known such a case.<sup>(l)</sup> If a note be joint and several, it is in fact one more than as many notes as the number of the signers, being the note of each one of them, and also the joint note of all.<sup>(m)</sup> And as many distinct actions may perhaps be brought upon the note;

(i) See *Smith v. Clapp*, 15 Pet. 125; *Suydam v. Barber*, 6 Duer, 34; *Robertson v. Smith*, 18 Johns. 459.

(j) In *Reese v. Abbot*, Cowp. 832, the defendants had signed a note promising to pay "jointly or severally." Lord *Manfield* said: "If 'or' is to be understood in this case as a disjunctive, who is to elect whether the note shall be joint or several? Certainly the person to whom it is payable. If so, the plaintiff has made his election. But 'or' is synonymous in this case with 'and.' They both promise that they, or one of them, shall pay; then both and each is liable *in solido*. The nature of the transaction forces this construction." See *Bishop v. Church*, 2 Ves. Sen. 100, 371; *Thomas v. Fraser*, 3 Ves. 399; *Burn v. Burn*, id. 573; *Sayer v. Chaytor*, 1 Lutw. 695; *Carter v. Carter*, 2 Day, 442. The fact that one or more of the parties signs as "surety" does not vary the case in this respect. *Hunt v. Adams*, 5 Mass. 358; *Read v. Cutts*, 7 Greenl. 186. Cases of irregular execution, as where a party, not a payee, signs upon the back of the note, or out of the usual place, are considered in the Chapter on Guaranty.

(k) *March v. Ward*, Peake, Cas. 130; *Clerk v. Blackstock*, Holt, 474; *Hemmenway v. Stone*, 7 Mass. 58; *Humphreys v. Guillow*, 13 N. H. 385; *Ladd v. Baker*, 6 Foster, 76; *Barnet v. Skinner*, 2 Bailey, 88; *Karck v. Avinger*, Riley, 201; *Groves v. Stephenson*, 5 Blackf. 584. See *Van Alstyne v. Van Slyck*, 10 Barb. 383.

(l) See, however, Lord *Kenyon*, *Birkley v. Presgrave*, 1 East, 220; *Leigh*, N. P. 664; *Willard, J.*, *De Ridder v. Schermerhorn*, 10 Barb. 638.

(m) *Parke, B.*, *King v. Hoare*, 13 M. & W. 505.

but it may be doubted whether a holder who has sued each promisor as a several promisor would be permitted to sue all together as joint promisors.<sup>(n)</sup> It is certain that he could not join a part only of the promisors, as defendants.<sup>(o)</sup> The rules of court and of procedure would regulate this matter generally, and they would probably provide in respect to costs, judgment, and execution, that injustice and oppression should not be permitted.

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(n) See *Key v. Hill*, 2 B. & Ald. 598; *Carne v. Legh*, 6 B. & C. 124; Lord *Eldon*, Ch., *Ex parte Brown*, 1 Ves. & B. 60.

(o) *Bangor Bank v. Treat*, 6 Greenl. 207; *Story, J., Minor v. Mechanics' Bank*, 1 Pet. 46

## CHAPTER VIII.

## OF THE HOLDER.

## SECTION I.

## OF THE RIGHTS AND DUTIES OF THE HOLDER.

By the holder of negotiable paper is meant, in law, the owner of it; for if it be in his possession without title or interest, he is, in general, considered only as the agent of the owner.<sup>(p)</sup>

His first and principal right is to demand payment of the note. And the various methods of payment, and the effect of such payment, will be considered in the chapter on the Payment of a Note or Bill.

The right of the owner to transfer his note or bill, by indorsement, or by delivery without indorsement, and the manner of such transfer, and its effect, will be considered in the succeeding chapters on Indorsement, and on Transfer by Delivery.

His principal obligation is to make a proper presentment for acceptance or for payment; and this topic also will be considered hereafter.

The subject of this chapter is different from these.

It has already been stated, and variously illustrated, that promissory negotiable paper differs essentially from all other contracts or instruments in the protection which the holder may claim. Thus, it has been shown in the chapter on Consideration, that while the common law refuses to enforce any other contract which does not rest either on a consideration or on a seal (which implies consideration), it makes a distinct exception in reference

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<sup>(p)</sup> *Pettee v. Prout*, 3 Gray, 502, where a note was payable to a person named or bearer, it was held that the production of the note at the trial by the plaintiff, he not being the party named, was sufficient evidence of his title, although he was the general agent of the payee who was alleged in the answer to be the owner of the note. See also *infra*, p. 255, note s.

to negotiable promissory paper, by the adoption of the principle of the law merchant, which forbids inquiry into the consideration which passed between any *distant* parties, but permits it if the owner demands payment from the party from whom he received the paper.

The general exception to this is when the paper, not being accommodation paper, would be subject to the defence of want or failure of consideration, if the action were brought by the promisee against the promisor, and a distant party, deriving title from the promisee, is chargeable with having notice or knowledge of this defence when he took the paper. For if so chargeable, the fact that he paid value for the paper does not give him any claim.(q)

It is, however, quite certain that no person is entitled to this privilege; that is, is entitled to hold the paper without reference to the original consideration, or to any equities of the defendant, unless he is a *bona fide* holder of the paper. And the principal purpose of this chapter is, first, to ascertain who is a *bona fide* holder of negotiable paper, for the purpose of this rule; and, secondly, what peculiar rights such a holder possesses, or what rights he has, although the party from whom he derives his title did not himself possess them.

## SECTION II.

### WHO IS A BONA FIDE HOLDER OF NEGOTIABLE PAPER.

THE definition of such a holder may be, he who acquires the paper, in good faith, for valuable consideration, from one capable of transferring the paper.(r)

Such a holder may have taken the paper in either of two ways;

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(q) *Bank of Tennessee v. Johnson*, 1 Swan, 217. Thus, in an action by a partner as indorsee of a note given to another partner, upon a sale by such other partner to the maker, of partnership property, the plaintiff stands in no better position to resist a claim of set-off than the payee of the note himself would, if the action had been brought in his name. *Otis v. Adams*, 41 Maine, 258. See also cases *infra*.

(r) The protection which the law extends to a *bona fide* holder is not limited to those who deal in negotiable paper as a part of their regular and ordinary business, but extends to every person to whom such paper may be lawfully transferred, and to every person who by the payment of value may acquire a title. *Gould v. Segee*, 5 Duer, 260, 269

or, as it may be better expressed, at either of two periods of time; he may have taken the paper before its dishonor, or he may have taken it after its dishonor. In many cases which treat of this question, no one is considered a *bona fide* holder who did not take the paper before dishonor. But while we shall see that he who takes it after its dishonor stands upon very different ground from him who takes it before dishonor, still he may take it after dishonor in good faith, and thereby acquire valuable rights. We shall therefore consider these two modes of obtaining the property of the paper separately.

1. Of one who takes the paper before its dishonor. In the first place, it is to be remarked, that there is a *prima facie* presumption of law in favor of every holder of negotiable paper, to the extent, that he is the owner of it,<sup>(s)</sup> that he took it for value,<sup>(t)</sup> and before dishonor,<sup>(u)</sup> and in the regular course of business.<sup>(v)</sup> But this presumption may be rebutted on either of these points. And the burden of proof lies on the party who alleges, as his defence against the claim of the holder of the paper, that there was a fatal defect in the consideration, or in the time of transfer.<sup>(w)</sup> If a note not negotiable is sued upon by a person other

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(s) *Pettee v. Prout*, 3 Gray, 502; *Hunter v. Kibbe*, 5 McLean, 279; *Ellicott v. Martin*, 6 Md. 509; *Warren v. Gilman*, 15 Maine, 70; *M'Gee v. Prouty*, 9 Met. 547; *Picquet v. Curtis*, 1 Sumner, 478. In an action by an indorsee against an acceptor, the fact that the acceptance was for accommodation does not throw the onus on the plaintiff to show that he gave value for it. *Ellicott v. Martin*, *supra*. And if the person who brings the action is an acceptor or first indorser, and there are subsequent names on the instrument, the law presumes that he has been obliged to pay it, and that he is rightfully in possession of the instrument. *Page v. Lathrop*, 20 Misso. 589; *Hunter v. Kibbe*, 5 McLean, 279; *Dugan v. United States*, 3 Wheat. 172. In *Henry v. Scott*, 3 Ind. 412, it was held that, in a suit by the assignee of a note against the maker, the latter may plead and prove that the plaintiff holds the notes merely as the trustee of the payee, in order to let in as a set-off an indebtedness due from the latter to the defendant.

(t) *Goodman v. Simonds*, 20 How. 343; *Kelly v. Ford*, 4 Iowa, 140. See also cases *infra*.

(u) *Lewis v. Parker*, 4 A. & E. 838; *Low v. Burrows*, 2 A. & E. 483; *Masters v. Barrets*, 2 Car. & K. 715; *Walker v. Davis*, 33 Maine, 516; *Burnham v. Wood*, 8 N. H. 334; *Burnham v. Webster*, 19 Maine, 232; *Ranger v. Cary*, 1 Met. 369; *Cain v. Spann*, 1 McMullan, 258; *Washburn v. Ramsdell*, 17 Vt. 299; *Smith v. Clopton*, 4 Texas, 109; *McMahan v. Bremond*, 16 Texas, 331; *Dickerson v. Burke*, 25 Ga. 225.

(v) *Walker v. Davis*, 33 Maine, 516. See also cases *supra*.

(w) *Cook v. Helms*, 5 Wisc. 107. In *Snyder v. Riley*, 6 Barr, 164, *Gibson, J.*, after stating that the law presumed a note was indorsed before maturity, added: "But the contract of indorsement, being without date and without witnesses, is so peculiarly susceptible of a fraudulent practice upon the drawer, by precluding perhaps a just defence on original grounds, that the presumption of fairness primarily applicable to it is not

than the payee, the possession of the note in court at the trial by the plaintiff is not *prima facie* evidence, as in the case of negotiable paper, that the note was transferred to the plaintiff before the commencement of the action, and before maturity.(x)

If the defendant rest upon some want of consideration which attaches to the holder, the questions of consideration, which we have already considered, come in. And to what has been already said, it may be added, that the cases sometimes seem to adopt, as a test of the rights of the holder, the question whether he "took the paper *in the usual course* of business." This phrase was used for this purpose in a case before Lord Mansfield,(y) and many judges have repeated it; but it seems to be open to some objection. As a compendious and convenient phrase, it may continue to be used; but it defines nothing; and it would be better if the law said more distinctly what are the employments of negotiable paper which leave to it all its privileges, and what are those which take them away. This phrase leaves all the real question behind; for this is in each case, substantially, what is the mercantile character of the transaction. The use of this phrase has helped to keep open the question, Is the giving of accommodation paper, or the paying an old debt, or securing an old debt by

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only of the slightest kind, but open to be blown away by the slightest breath of suspicion." In this case evidence was offered that the defendant had publicly repudiated the note, which was not put in suit until after the lapse of three years from maturity; that payment was not demanded at the place where the note was made payable; that the plaintiff refused to permit the defendant to inspect his books; and that it did not appear that the note was protested, as is usual in such cases, or notice of dishonor given to charge the indorser. It was held that all or any of these circumstances, proved or conceded, would be sufficient to cast the burden of proving the time and the consideration of the transfer upon the plaintiff. In *Hill v. Kroft*, 29 Penn. State, 186, the facts that no demand of payment was made upon the makers at maturity of the note, that it was not protested for non-payment, and that suit was not brought for more than six months after it was due, were sufficient to shift the burden of proof. In *Ranger v. Cary*, 1 Met. 369, it was held that the burden was not discharged by proof that the note was transferred and delivered to the plaintiff before dishonor, but was not indorsed until afterwards. But in *McCready v. Cann*, 5 Harring. Del. 175, it was held that no inference of irregularity could arise from the omission to present the note or to protest it, that not being necessary to charge the drawer.

(x) *Barrick v. Austin*, 21 Barb. 241. See also *Bircleback v. Wilkins*, 22 Penn. State, 26.

(y) *Miller v. Race*, 1 Burr. 457. See also *Littell v. Marshall*, 1 Rob. La. 51; *Evans v. Smith*, 4 Binn. 366. In *Billings v. Collins*, 44 Maine, 271, it was held that the assignment of negotiable paper by operation of a bankrupt or insolvent law was not in the regular course of trade, and that the assignee could acquire only the rights of the insolvent

the assignment of negotiable paper, a transaction which the law views as *according to the usage of merchants*? There is certainly no unity of opinion on this point. Thus, the courts of New York hold that giving paper to secure an old debt — and at one time they held, or were thought to hold, that paying an old debt by assignment of negotiable paper — is not mercantile; (z) while the Supreme Court of the United States, Story, J. giving the opinion, held, on better grounds we think, that these transactions were mercantile.(a) That they are constantly occurring among merchants, and that a considerable portion of the negotiable paper made in business is used in this way, is certain. Nor do we see that there is anything objectionable, or anything which courts should seek to restrain or suppress, in this employment of negotiable paper; while, on the other hand, it conforms to the fundamental principle of the law of negotiable paper, that it is the representative of money, and may be used everywhere as its substitute. And therefore we are disposed to believe that the law of this country is tending towards the rule, that whether negotiable paper is sold, or discounted, or indorsed over to pay a new debt, or for a new purchase, or to secure a new debt, or an old debt, or to pay an old debt, it becomes in each case the property of the holder, and carries with it all the privileges of negotiable paper, unless there be something in the particular transaction which is equivalent to fraud, actual or constructive.(b)

A person cannot acquire the rights of a *bona fide* holder of a note by paying the amount thereof for the person from whom it is due, without his request, express or implied.(c)

If there be fraud of any kind on the part of the holder, or on the part of the transferrer with any privity or knowledge on the part of the holder, he can, of course, found no right upon his fraud.

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(z) See *supra*, p. 222.

(a) *Swift v. Tyson*, 16 Pet. 1.

(b) See *supra*, pp. 218 - 228.

(c) *Willis v. Hobson*, 37 Maine, 403. An expressman received the money to pay a note which was at a bank in Boston, which money he disposed of in another manner, and on the last day of grace he called on the plaintiffs and requested them to pay the note for him, as he was short of funds, which was assented to; but from the lateness of the request the payment could not be made that day, and to protect the teller for delay of payment the firm name of the express company and the name of the plaintiffs were indorsed on the note, and the next day it was paid by the plaintiffs. *Held*, that they could not recover, on the ground stated in the text.



So, if, without actual fraud, there is a want or failure of consideration, which would operate as a defence if the transferrer had sued, the transferee chargeable with notice or knowledge thereof is open to the same defence, if it be not accommodation paper. And this rule has been carried beyond the limits even of constructive fraud. For it has been held that the holder of a note had no claim against parties to it, if the note were open to a defence while in the hands of his transferrer, and the nature of the paper or the circumstances of the transaction by which he became the holder showed that his ignorance of the defence arose from a want of reasonable care and diligence. But the "good faith" required of the holder certainly does not now require reasonable care and diligence on his part to ascertain the right of the transferrer to give him the paper. There was, however, a period, though not a long one, when this requirement was a part of the English law of negotiable paper.<sup>(d)</sup> Then gross negligence was adopted as the rule.<sup>(e)</sup> Afterwards gross negligence was held merely to be evidence of *mala fides*, and not the thing itself. And now, to use the emphatic words of Lord Denman, the last remnant of that doctrine is shaken off.<sup>(f)</sup> It may now be said to be the law in that country,<sup>(g)</sup> that the holder of negotiable paper does not lose his rights by proof that he took the paper negligently, nor unless fraud be shown.

The doctrine of *Gill v. Cubitt* has been followed in several cases in this country,<sup>(h)</sup> but on principle and on high authority

(d) In *Gill v. Cubitt*, 3 B. & C. 466, the question was held to be, whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. See also *Down v. Halling*, 4 B. & C. 330; *Snow v. Peacock*, 2 C. & P. 215; *Beckwith v. Corral*, 2 C. & P. 261; *Strange v. Wigney*, 6 Bing. 677; *Hatch v. Searles*, 2 Small & G. 147, 31 Eng. L. & Eq. 219.

(e) *Crook v. Jadis*, 5 B. & Ad. 909; *Backhouse v. Harrison*, id. 1098.

(f) "Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine." Per Lord Denman, C. J., in *Goodman v. Harvey*, 4 A. & E. 870, 6 Nev. & M. 372. It is a question for the jury whether the party taking the bill was guilty of bad faith. See *Cunliffe v. Booth*, 3 Bing. N. C. 821. See *Crook v. Jadis*, 5 B. & Ad. 909, per *Patteson*, J.

(g) *Miller v. Race*, 1 Burr. 452; *Lawson v. Weston*, 4 Esp. 56; *Goodman v. Harvey*, 6 Nev. & M. 372; *Raphael v. Bank of England*, 17 C. B. 161, 33 Eng. L. & Eq. 276; *Uther v. Rich*, 10 A. & E. 784; *Arbouin v. Anderson*, 1 Q. B. 498.

(h) *Pringle v. Phillips*, 5 Sandf. 157; *Holbrook v. Mix*, 1 E. D. Smith, 154; *Hall v. Hale*, 8 Conn. 336; *Sandford v. Norton*, 14 Vt. 228; *Nicholson v. Patton*, 13 La. 43; *Smith v. Mechanics' &c. Bank*, 6 La. Ann. 610; *Greeneaux v. Wheeler*, 6 Texas,

Cases of notice See *Lawson v. Weston* 49th Pa. 156. To charge holder with fraud in receipt of much be shown that he had notice of the fraud. Proof of circumstances which would put a reasonable man upon inquiry is not enough.

we incline to the opinion that the rule of the late English cases is better adapted to the free circulation of negotiable paper, and the true interests of trade.(i)

But it must still be true, that while gross, or even the grossest negligence, is a different thing from fraud, the negligence may be such, and so accompanied, as to afford reasonable and sufficient grounds for believing that it was intentional and fraudulent.(j)

Thus, although notice or knowledge of defeating circumstances may not be proved, the facts of the case, the relations between the parties, and their method of dealing, may be such as to show

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515; *Cone v. Baldwin*, 12 Pick. 545. In *Merriam v. Granite Bank*, 8 Gray. 254, *Shaw*, C. J., after stating the general rule, said: "But this rule is to be taken with a strict observance of the qualification, that the negotiable security be taken in the due course of business, without notice, or reasonable cause to suspect, that the party from whom it is taken has not the full title which the possession of the security and the names borne upon it naturally import." In this case a promissory note indorsed in blank was accidentally left by the owner in a broker's office. The broker was indebted to a bank for money lent, payable on demand, and he was accustomed to give the bank as collateral security for such loans his own memorandum checks, payable on demand, and indorsed notes as collateral security. The note in question was found among these notes and checks, but there was no evidence of the manner in which it came there. The former president of the bank testified, that, from his knowledge of the business of the brokers in question, and from what they had often told him, he supposed that the collateral notes were not notes which the brokers had purchased or discounted, but notes on which they had made advances, and which they held as collateral. It was held, under these circumstances, that the bank took the notes on the credit of the brokers merely, and the taking was under such circumstances as to put them on their guard to inquire into the title of the brokers.

(i) *Matthews v. Poythress*, 4 Ga. 287, 306; *Ellicott v. Martin*, 6 Md. 509. This question was considered at length in the recent case of *Goodman v. Simonds*, 20 How. 343, 363, in which it is said, that if the defect or infirmity in the title of the instrument appears on its face at the time of transfer, the question whether the person who took it had notice or not is generally a question of construction for the court; but that where it is proposed to impeach the title of the holder by proof of facts and circumstances outside of the instrument itself, the defendant is bound to prove notice or knowledge of such facts, and mere want of care and caution on the part of the holder is not sufficient. In *Crosby v. Grant*, 36 N. H. 273, the point was not decided, but it was held, that, if a person who took a note under circumstances of suspicion such as ought to put him on inquiry, took it subject to equities, yet the facts that the note was taken on the last day of grace from a bank in Boston, Massachusetts, where it had been discounted, the maker residing at Great Falls in New Hampshire, the full amount being paid to the banks, and at the trial the indorsements of several parties appeared to be erased from the note, leaving upon it that of the payee alone, do not constitute a case for the application of this doctrine. See also *Worcester Co. Bank v. Dorchester, &c. Bank*, 10 Cush. 488.

(j) See cases cited *supra*, p. 258.

that there was either knowledge, or an intentional and careful avoidance of knowledge ; this we should say must have the same effect in law as knowledge.

But evidence of notice to, or of knowledge on the part of the holder, of facts which would defeat his recovery, must not be ambiguous.<sup>(k)</sup> The negligence of the loser is, however, no excuse for the dishonesty of the receiver, and therefore a failure to give public notice of the loss of a bill or note will not preclude the owner from showing that the holder took it *mala fide*. But the negligence of the one may be an excuse for the negligence of the other, and might authorize him to defend himself on the maxim, *Potior est conditio possidentis*.<sup>(l)</sup>

If the defendant is compelled by due process of law to pay the note to another party, the plaintiff who holds the note cannot recover it of him. Thus, if the paper be not negotiable, and trustee process is served upon the promisor,<sup>(m)</sup> or if the paper be negotiable, and such process is served in States where it may be served in such cases, the promisor must pay the plaintiff in the trustee process, and this would be a defence if sued by the holder.<sup>(n)</sup> But if the paper be negotiable, and such attachment is not allowed by statute, the rights of a *bona fide* holder are not affected by such an attachment.<sup>(o)</sup> Although it is made before the transfer to the holder, the doctrine of *lis pendens*, viz. that whoever purchases property which is in litigation at the time takes it subject to any decree which may be made in respect to it in the pending suit, does not apply to negotiable paper.<sup>(p)</sup>

(k) "It must clearly appear that the indorsee was apprised of such circumstances as would have avoided the note in the hands of the indorser." Per *Woodbury, J.*, *Perkins v. Challis*, 1 N. H. 254.

(l) Per *Best, C. J.*, in *Snow v. Peacock*, 3 Bing. 406, 411, 11 J. B. Moore, 286. See also *Matthews v. Poythress*, 4 Ga. 287.

(m) *Cushman v. Haynes*, 20 Pick. 132.

(n) *Peck v. Maynard*, 20 N. H. 183; *Thompson v. Carroll*, 36 N. H. 21; *Stearns v. Wrisley*, 30 Vt. 661; *Amoskeag Manuf. Co. v. Gibbs*, 8 Foster, 316; *Griswold v. Davis*, 31 Vt. 390.

(o) *Kieffer v. Ehler*, 18 Penn. State, 388; *Ludlow v. Bingham*, 4 Dallas, 47; *Huff v. Mills*, 7 Yerg. 42; *Hinsdill v. Safford*, 11 Vt. 309; *Little v. Hale*, id. 482. In Vermont, by a statute passed in 1841, negotiable paper is subject to attachment until notice of the transfer is given. A statute passed in 1852 exempted from the operation of this statute paper discounted at banks. *Griswold v. Davis*, 31 Vt. 390.

(p) *Hill v. Kroft*, 29 Penn. State, 186; *Winston v. Westfeldt*, 22 Ala. 760.

The knowledge of a defect or defeasance will not destroy the rights of the transferee, unless it be a defect or defeasance which would have destroyed the rights of *his* transferrer. Thus, if A makes a note to B, who indorses it for value to C after the consideration has wholly failed, but before its maturity, and B has no knowledge of this failure, but C has such knowledge, he will nevertheless recover on the note, because he stands in B's place, and has all B's rights. And therefore any of C's indorsees, immediate or distant, will be unaffected either by C's knowledge or by their own. *(q)* And knowledge on the part of the holder, at the time he took the note, that it was not to be paid on a specified contingency, is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of this fact. *(r)* So, too, it has been held that a person who acquires a good title to a note, by taking it in ignorance that the agent making it had exceeded his authority, may take a renewal of the note from the agent, although at that time he knew that the original note was given without authority. *(s)*

If the maker or other person liable on negotiable paper pays it before it is due, he is undoubtedly liable upon it to a *bona fide* holder for value. *(t)*

2. Where the paper is taken after dishonor. We prefer this phrase to the more usual phrase "after maturity"; for dishonor and non-payment at maturity are not necessarily the same thing. For example, we shall see that a note on demand is mature and demandable at once. But it is not dishonored until a reasonable period of non-payment has elapsed.

If negotiable paper be taken after dishonor, it loses a large part of its peculiar privileges, because only so long as it may be

*(q)* Hascall v. Whitmore, 19 Maine, 102; Prentice v. Zane, 2 Grat. 262; Boyd v. McCann, 10 Md. 118; Howell v. Crane, 12 La. Ann. 126; Watson v. Flanagan, 14 Texas, 354.

*(r)* Adams v. Smith, 35 Maine, 324. See also Ferdon v. Jones, 2 E. D. Smith, 106; Davis v. McCready, 4 E. D. Smith, 565.

*(s)* Hopkins v. Boyd, 11 Md. 107. The original note in this case was signed by one partner in the firm name. It was given out of the course of the partnership business, and without the knowledge of the other partner. The plaintiff did not know this at the time he took the note; but he was informed of the fact before the note was renewed. It was held that his knowledge was no defence to an action on the renewed note.

*(t)* See cases cited p. 230, note *w*; also, Webster v. Lee, 5 Mass. 334; Wheeler v. Guild, 20 Pick. 545; White v. Kibling, 11 Johns. 128; Brown v. Davies, 3 T. R. 80; Dod v. Edwards, 2 Car. & P. 602.

regarded as certain to become so much money at a definite period, is it the representative or equivalent of money.

It may still be transferred, either by mere delivery, or by indorsement and delivery, according to the character of the paper. And if so transferred for value, the transferee acquires against all previous parties all the rights which his transferrer held against them. For it is still so far negotiable as to admit of this transfer,<sup>(u)</sup> but is not, after dishonor, so far negotiable, that equities of defence unknown to the taker will not defeat it in his hands.

We will proceed to consider the question, What constitutes the dishonor of negotiable paper? And the general definition of this may be, the non-payment of negotiable paper when it should be paid.<sup>(v)</sup> It will follow from this definition, that the dishonor may come from non-payment at a time certain, if the paper is so payable. Or from a demand and refusal, if the paper were payable on demand. Or from such a lapse of time, if the paper were payable on demand, that the law considers that the paper ought to have been paid, and that every one is bound to suppose that the paper must have been demanded and refused somewhere within that time. If the makers of a negotiable instrument negotiate it after it is due, it would seem that they could not set up, in defence to an action by a *bona fide* holder, want or failure of consideration in the inception of the instrument.<sup>(w)</sup>

When paper is payable at a certain time, and in the case of bills payable at sight where these have grace, the last day of grace is of course the time at which non-payment operates dishonor.

The question may arise, on what part of the day does dishonor fall upon the note by non-payment. We should say, not until the close of business hours in our cities, and not until the close

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(u) "A note does not cease to be negotiable, because it is overdue. The promisee, by his indorsement, may still give a good title to the indorsee." Per *Shaw*, C. J., in *Baxter v. Little*, 6 Met. 7. See also *Powers v. Nelson*, 19 Misso. 190, and cases *passim*.

(v) In *Fitch v. Jones*, 5 Ellis & B. 238, 32 Eng. L. & Eq. 134, a note bore date Jan. 1, 1854, payable in two months. Across the note was written, in the hand of the maker, "Due 4th March, 1855." The note was in fact made Jan. 1, 1855, and was indorsed to the plaintiff before March 1, 1855. *Held*, that the note was not at this time dishonored.

(w) *Boehm v. Sterling*, 7 T. R. 423.

of the day where no usage limited the business hours, — unless there had been previously an actual and positive refusal to pay the paper, and notice or knowledge thereof on the part of the taker.

It is obvious, however, that cases of this kind might differ much in their facts, and in the legal inferences from them. Thus, if the holder of a note offers it for sale at nine o'clock of the day of its maturity, on the ground that he needs the money at once, and shall not otherwise have it until the banks close, or until they open next morning, and the buyer believes him, he would not be affected by the fact of a previous refusal to pay on that morning, even if he gave less than the face, because he might calculate the chances of the promisor's solvency. But if he bought it ten minutes before the last minute when it could be paid, his conduct would be much more open to the inference that he knew the paper had been refused, or would be unpaid, and took his risk of getting the money; and if the paper had then been refused, he must be regarded as the taker of dishonored paper. Perhaps, however, the simpler and better rule may be this. As the payer has all the business hours of the last day in which he may pay the paper, all other persons may suppose it unpaid, and purchase it in that belief, until the close of those hours.(x).

3. Of the dishonor of paper payable on demand. Bills on sight, and bills or notes payable on demand, have no definite time at which non-payment at once operates dishonor. Of this kind of paper three things must be said.

One is, that a reasonable time must elapse before mere non-payment dishonors the bill or note. What this time is, has not been, and cannot be, fixed by any definite and precise rule. One day's delay of paper on demand certainly would not dishonor it; five years certainly would. And in each case, how many days, or weeks, or months, are requisite for this effect, must depend upon the test, whether so long a time has elapsed, that it must be inferred from the particular circumstances and the general conduct

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(x) In *Crosby v. Grant*, 36 N. H. 273, it was held that a note payable generally, and not at any particular place, might be bought from a bank where it had been discounted, on the last day of grace, and the holder protected. But in *Pine v. Smith*, 11 Gray, the same point was decided the other way, on grounds of the sufficiency of which we have some doubt.



of business men, both of which should be considered, that the paper in question must have been intended to be paid within this period, and, if not paid, must have been refused.(y) There are

(y) *Muilman v. D'Eguino*, 2 H. Bl. 565; *Mullick v. Radakissen*, 9 Moore, P. C. 46, 28 Eng. L. & Eq. 86; *Shute v. Robins*, Moody & M. 133; *Mellish v. Rawdon*, 9 Bing. 416; *Martin v. Winslow*, 2 Mason, 241; *Wallace v. Agry*, 4 Mason, 336, 5 Mason, 118; *Aymar v. Beers*, 7 Cowen, 705; *Robinson v. Ames*, 20 Johns. 140; *Gowan v. Jackson*, 20 Johns. 176; *Dumont v. Pope*, 7 Blackf. 367; *Lord v. Chadbourne*, 8 Greenl. 198; *Perry v. Green*, 4 Harrison, 61; *Lockwood v. Crawford*, 18 Conn. 361; *Culver v. Parish*, 21 Conn. 408; *Atlantic DeLaine Co. v. Tredick*, 5 R. I. 171; *Carll v. Brown*, 2 Mich. 401; *M'Kinney v. Crawford*, 8 S. & R. 351; *Emerson v. Crocker*, 5 N. H. 159; *Odiorne v. Howard*, 10 N. H. 343; *Carlton v. Bailey*, 7 Foster, 230; *Parker v. Tuttle*, 44 Maine, 459; *Dennen v. Haskell*, 45 Maine, 431; *Jerome v. Stebbins*, 14 Calif. 457; *Ayer v. Hutchins*, 4 Mass. 370; *Thurston v. M'Kown*, 6 Mass. 428; *Hemmenway v. Stone*, 7 Mass. 58; *Field v. Nickerson*, 13 Mass. 131; *Stockbridge v. Damon*, 5 Pick. 225; *Thompson v. Hale*, 6 Pick. 259; *Sylvester v. Crapo*, 15 Pick. 93; *Stevens v. Bruce*, 21 Pick. 193. *American Bank v. Jenness*, 2 Met. 288; *Ranger v. Cary*, 1 Met. 369; *Knowles v. Parker*, 7 Met. 30; *Seaver v. Lincoln*, 21 Pick. 267; *Weeks v. Pryor*, 27 Barb. 79.

In *Furman v. Haskin*, 2 Caines, 369, a note payable on demand was considered dishonored after eighteen months from the time when it was given; in *Sice v. Cunningham*, 1 Cowen, 397, after five months; in *Field v. Nickerson*, 13 Mass. 131, after eight months; in *Losce v. Dunkin*, 7 Johns. 70, after two months; in *Martin v. Winslow*, 2 Mason, 241, after seven months; in *Camp v. Scott*, 14 Vt. 387, after two months; in *Atlantic DeLaine Co. v. Tredick*, 5 R. I. 171, after thirteen months; in *Emerson v. Crocker*, 5 N. H. 159, after ten months; in *Carlton v. Bailey*, 7 Foster, 230, after seven months and a half; in *Parker v. Tuttle*, 44 Maine, 459, after four months; in *Jerome v. Stebbins*, 14 Calif. 457, after thirteen months; in *Loomis v. Pulver*, 9 Johns. 244, after two years; in *American Bank v. Jenness*, 2 Met. 288, after eight months.

In *Aymar v. Beers*, 7 Cowen, 705, a delay of twenty-nine days was not considered unreasonable under the circumstances of the case; so in *Van Hoesen v. Van Alstyne*, 3 Wend. 75, a delay of two or three months; in *Robinson v. Ames*, 20 Johns. 146, a delay of seventy-five days; in *Wethey v. Andrews*, 3 Hill, 582, a delay of four or five weeks; in *Lockwood v. Crawford*, 18 Conn. 361, a delay of sixty days; in *Dennett v. Wyman*, 13 Vt. 485, a delay of two days; in *Sanford v. Mickles*, 4 Johns. 224, a delay of five months; in *Carll v. Brown*, 2 Mich. 401, a delay of twenty-five days; in *Dennen v. Haskell*, 45 Maine, 430, a delay of thirty days; in *Ranger v. Cary*, 1 Met. 369, a delay of one month.

The question of reasonable time is well stated by *Parker, C. J.*, in *Field v. Nickerson*, 13 Mass. 131. After referring to the analogy generally recognized in this respect between a note payable on demand and a bill payable at sight, so that, as in the latter case the holder must present his bill for acceptance within a reasonable time, in order to charge the drawer, so in the former, the indorsee must make demand of payment on the promisor within a reasonable time, in order to charge the indorser, the learned judge says: "And we are of opinion that this is the correct doctrine on the subject. For as, on the one hand, it can hardly be supposed that the indorser and indorsee, when they make their contract, contemplate a liability on the indorser, unless reasonable pains should be taken to procure payment of the actual debtor; so, on the other, we do not think it enters into their calculations that, as between them, the note should be considered due when drawn in such manner as to require, in all cases, a demand



two classes of cases in which this question of reasonable time has arisen; the one, as to what is a reasonable time to make a demand on a note payable on demand, or a presentment of a bill

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the instant, or the same day, it may have been indorsed. As it respects the promisor himself, he is answerable immediately to the promisee or indorsee; and he may be sued the instant he has given his signature, even without a previous demand. But the condition on which the indorser is liable is, that payment shall be demanded within a reasonable time, and the earliest notice possible given of refusal. This time may, therefore, vary according to the circumstances and situation of the parties, to be determined by the jury under the direction of the court. It is impossible to fix any precise period, each case depending upon its own circumstances, as in the case of a bill payable at sight, which must be presented to the drawer as soon as can conveniently be done, taking into view all the circumstances of the holder and the drawer." In *Seaver v. Lincoln*, 21 Pick. 267, *Shaw*, C. J. said, that "one of the most difficult questions presented for the decision of a court of law is, what shall be deemed a reasonable time within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another."

In Massachusetts it is provided by statute that, upon a promissory note payable on demand, a demand made at the expiration of sixty days from the date thereof, without grace, or at any time within that term, shall be deemed to be made within a reasonable time; but no subsequent presentment and demand shall charge the indorser. Gen. Stats. 1860, c. 53, § 8. This statute does not apply to the case of such a note indorsed after this term of sixty days from its date has elapsed, but in such case it seems that a demand on the maker is within a reasonable time, if made within a like term of sixty days from the indorsement of the note. *Rice v. Wesson*, 11 Met. 400.

And in respect to bills of exchange payable on or after sight, in some foreign nations there are positive enactments fixing the times of presentment with reference to the places where the bill is drawn, and where the drawee resides, as in the French *Code de Commerce*, Lib. 1, pt. 8, § 11.

In England it has been held that a negotiable note payable on demand is not dishonored by mere lapse of time. Something more must be brought to the knowledge of the indorser to charge him with the equities of the original parties. *Barrough v. White*, 4 B. & C. 325; *Brooks v. Mitchell*, 9 M. & W. 15. In the latter case it was held that a note, payable on demand with interest, made in 1824, and indorsed in 1838, and upon which no interest had been paid for three years immediately preceding the indorsement, was not subject to an equitable defence as between the original parties. It was urged in that case, that the non-payment of interest for three years was sufficient to put the indorsee upon inquiry. But *Parke*, B., expressing the opinion of the court, said: "I cannot assent to the arguments urged in behalf of the plaintiffs. If a promissory note payable on demand, is after a certain time to be treated as over-due, although payment has not been demanded, it is no longer a negotiable instrument; but a promissory note, payable on demand, is intended to be a continuing security."

A promissory note payable on demand is probably a species of security rarely used in England; and when it is used, it is regarded as a continuing security until the holder shall see fit to render it due by a demand. Here it has long been in use, and the rules applicable to it have been fixed after the analogy of bills payable at sight. See remarks of *Shaw*, C. J., in *Sylvester v. Crapo*, 15 Pick. 92, 94.

drawn payable on or after sight, in order to charge an indorser; and the other as to the length of time in which such a note or bill would be held to be dishonored, and subject to those grounds of defence which would have been open to the maker of the note or the drawer of the bill in a suit by the payee.(z)

The rule requiring the presentment of the bill or note within a reasonable time applies in the same way, though the drawer or indorser has sustained no actual loss by the delay, and has continued solvent up to the time of the presentment.(a) In determining this question of reasonable time, it is proper to look to the interests of the holder of the paper, as well as of the drawer; and accordingly, in case of a foreign bill, the rate of exchange is a circumstance that may be considered in determining whether the holder has delayed unreasonably to put it in circulation or to send it forward to the drawee; for it cannot be required of him to part with it instantly under all disadvantages.(b) A delay

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(z) See *Ranger v. Cary*, 1 Met. 369, 373, per *Dewey, J.*

(a) *Carter v. Flower*, 16 M. & W. 743; *Mullick v. Radakissen*, 9 Moore, P. C. 46, 28 Eng. L. & Eq. 86. In the latter case, Baron *Parke* said, on this point: "The court below decided, that the solvency of the drawers and the want of proof of actual loss by laches constituted no answer to the objection of laches. We think they were right. There is no trace of such a qualification in the elaborate judgment of Lord Chief Justice *Tindal*, in *Mellish v. Rawdon*, 9 Bing. 417, in which the circumstances which constitute a reasonable delay are fully discussed; no mention is made of the insolvency of the drawer, subsequent to the drawing, although it did occur in that case, or some loss by the drawer, being an essential condition to the application of the rule laid down; and in *Muilman v. D'Eguino*, 2 H. Bl. 565, it was clear that the failure of the drawer caused no damage to the plaintiff, being before the time that the bill could possibly have been presented in India; yet that circumstance was not mentioned as dispensing with the obligation to present in a reasonable time; and, with respect to all bills of exchange payable after date, it is fully settled, that neither the want of presentment at the time the bill is due, nor the want of due notice, are excused because the drawer has continued solvent, or the holder incurred no loss by non-presentment or want of regular notice. This point was fully considered in the case of *Carter v. Flower*, 16 M. & W. 743, and we believe admits of no doubt; and we agree with the court below, that the continued solvency of the drawers does not prevent the application of the rule that the bill must be presented in a reasonable time, with reference to the interest of the drawer to put the bill into circulation, or the interest of the drawee to have the bill speedily presented." In this respect a check differs from a bill of exchange, and the doctrine that the drawer of a check continues liable unless he has actually sustained a loss from the delay of presentment has no application in the case of a bill of exchange.

(b) *Mellish v. Rawdon*, 9 Bing. 416. *Tindal, C. J.*, delivering the opinion of the court, in referring to the expression used by *Buller, J.*, in *Muilman v. D'Eguino*, 2 H. Bl. 565, that "if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches," said: "'To lock the

arising from the sickness of the holder, or from other accident, may be properly considered. (c) If the bill be kept in circulation, its final presentment may be delayed as long as the reasonable

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bill up for any length of time ' does not and cannot mean, that keeping it in his hands for any time, however short, would make him guilty of laches. It never can be required of him, instantly on the receipt of it, under all disadvantages, either to put it into circulation, or to send it forward to the drawee for acceptance. To hold the purchaser bound by such an obligation would greatly impede, if not altogether destroy, the market for buying and selling foreign bills, to the great injury, no less than to the inconvenience, of the drawer himself. For, if he has no opportunity to realize his bill by sale at home, he can only obtain the amount by sending it out to a correspondent at the place upon which it is drawn, incurring thereby delay, expense, and risk ; and if the buyer is not to be allowed a reasonable discretion as to the time of parting with the bill, how can the drawer expect to find a ready sale ? The meaning of the expression above referred to is, and indeed the very form of expression denotes it, that he must not lock the bill up for an indefinite time ; that there must be some limit to its being kept from circulation ; and what limit can there be, except that the time during which it is locked up must be reasonable ? But what is or is not reasonable for that purpose, a jury must, with the assistance of the judge, under all the circumstances of the particular case, determine.' Like considerations were entertained by the Court of the Privy Council in the case of *Mullick v. Radakissen*, 9 Moore, P. C. 46, 28 Eng. L. & Eq. 86, on appeal from the Supreme Court at Calcutta. In this case, a bill of exchange was drawn at Calcutta, on the 16th of February, 1848, by the respondents, on Dent & Co., at Hong Kong, payable sixty days after sight, and indorsed by the respondents to Muttyloll Seal or order. Muttyloll Seal, in consequence of the depressed state of the money market at Calcutta and the unsalableness of bills on China at that time at Calcutta, kept the bill for five months and nine days, and then sold it to the appellant, who did not present it for acceptance at Hong Kong till the 24th of October in that year, when Dent & Co. refused to accept it. It was held that the presentation of the bill for acceptance was not made within a reasonable time, and that the respondents, the drawers, were discharged. Baron *Parke*, pronouncing the judgment of the court, said : " The court (at Calcutta) assumed, that the correct principle was laid down fully in the cases of *Mellish v. Rawdon*, 9 Bing. 416, which is in accordance with the prior cases of *Muilman v. D'Eguino*, 2 H. Bl. 565, and *Fry v. Hill*, 7 Taunt. 397, that in determining the question of ' reasonable time ' for presentment, not the interests of the drawer only, but those of the holder, must be taken into account ; that the reasonable time expended in putting the bill into circulation, which is for the interest of the holder, is to be allowed ; and that the bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. The court, in acting upon that principle, concluded from the evidence that the bill was improperly detained for a portion at least of the time which elapsed between the 16th of February, 1848, when it was drawn, and the 26th of July, when it was indorsed over by Muttyloll Seal, the then holder, to the plaintiff. They thought that the evidence proved, that for the whole of that time, a period of more than five months, bills on China were altogether unsalable in Calcutta ; that such was the permanent and regular state of the market ; and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had a right, with a view to his own interests,

(c) *Aymar v. Beers*, 7 Cowen, 705.

convenience of the successive holders may require. *(d)* If a note payable on demand was intended as a continuing security, and not for commercial purposes, this is a circumstance which greatly extends the time within which one may take it without being made subject to the equities of dishonored paper. *(e)* This intention may sometimes be inferred from the phraseology of the note; and the fact that it bears interest has sometimes been considered as indicating such an intention. *(f)* A note transferred after it is due is considered as a note payable on demand, as regards the time within which a demand must be made in order to charge the indorser. *(g)*

The reasonableness of the time for presentment of bills on sight, and of bills and notes payable on demand, was formerly thought to be wholly a question of fact for the determination of the jury; *(h)* but the expediency of having a fixed rule of law

to keep the bill for some time, he had no such right when there was no hope of the amendment of that state of things; and we are of opinion, that the evidence fully justified this conclusion from it, and that the court, deciding on facts as a jury, were perfectly right. Indeed, we should not have reversed their judgment on a matter of fact, unless we were quite satisfied they were wrong, their knowledge of local circumstances and the character and appearance of the witnesses enabling them to form a more correct opinion than a tribunal of appeal in this country possibly could. But in our opinion they drew a proper inference from the evidence in the case."

In *Straker v. Graham*, 4 M. & W. 721, where a bill was drawn in duplicate at Carbonear, in Newfoundland, on the 12th of August, upon a firm in England, payable ninety days after sight, and it was not presented for acceptance until the 16th of November, it was held, in absence of proof to explain the delay, that the bill was not presented within a reasonable time.

*(d)* *Goupy v. Harden*, 7 Taunt. 159.

*(e)* *Vreeland v. Hyde*, 2 Hall, 429

*(f)* *Barough v. White*, 4 B. & C. 325, 6 Dow. & R. 379; *Vreeland v. Hyde*, *supra*; *Wethey v. Andrews*, 3 Hill, 582; *Lockwood v. Crawford*, 18 Conn. 361. In the latter case, *Church*, C. J. thought the fact of the note's bearing interest an important one, as indicating a continuing note. But the mere circumstance that it bears interest does not take it out of the general rule, that dishonor is to be presumed after a reasonable time. *Perry v. Green*, 4 Harrison, 61. See also *Agawam Bank v. Strever*, 18 N. Y. 502, 513. In *Weeks v. Pryor*, 27 Barb. 79, the court thought it evident, from the fact that a note payable on demand bore interest, that an immediate demand of payment was not contemplated by the parties.

*(g)* *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Sanborn v. Southard*, 25 Maine, 409; *Branch Bank of Montgomery v. Gaffney*, 9 Ala. 153; *Gray v. Bell*, 3 Rich. 71; *M'Kinney v. Crawford*, 8 S. & R. 351; *Brenzer v. Wightman*, 7 Watts & S. 264; *Campbell v. Carman*, 1 Philad. 283; *Tyler v. Young*, 30 Penn. State, 143; *Beebe v. Brooks*, 12 Calif. 308.

*(h)* *Muilman v. D'Eguino*, 2 H. Bl. 565; *Fry v. Hill*, 7 Taunt. 397; *Goupy v. Harden*, 7 Taunt. 159; *Shute v. Robins*, *Moody & M.* 133; *Hoar v. Da Costa*,

in place of the uncertain and contradictory decisions of juries, in a matter of so much importance in mercantile affairs, has finally led to the adoption of the principle which may now be considered a settled one, — that, when the jury has determined the facts of the case, the reasonableness of the time is a question of law for the court to determine or to direct the jury upon. (i) Practically, in very many cases, it is a mixed one of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of the case. (j)

2 Stra. 910; *Manwaring v. Harrison*, 1 Stra. 508; *Straker v. Graham*, 4 M. & W. 721; *Hilton v. Shepherd*, 6 East, 14, note; *Hopes v. Alder*, 6 East, 16, note.

(i) *Moule v. Brown*, 5 Scott, 694, 4 Bing. N. C. 266; per *Buller, J.*, in *Tindal v. Brown*, 1 T. R. 169; *Medcalf v. Hall*, 3 Doug. 113; *Appleton v. Sweetapple*, 3 Doug. 137; *Darbishire v. Parker*, 6 East, 3, per *Lawrence, J.*; *Vreeland v. Hyde*, 2 Hall, 429; *Furman v. Haskin*, 2 Caines, 369; *Sice v. Cunningham*, 1 Cowen, 408; *Aymar v. Beers*, 7 Cowen, 705; *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Dennett v. Wyman*, 13 Vt. 485; *Sylvester v. Crapo*, 15 Pick. 92, per *Shaw, C. J.* In *Barbour v. Fullerton*, 36 Penn. State, 105, the court, though admitting the general rule, that, where the facts are undisputed, what is a reasonable time is a question of law, were of opinion that in case of a note payable on demand, made in another State, and governed by its laws, this question is one of fact for the jury, under proper instructions from the court.

(j) In *Mellish v. Rawdon*, 9 Bing. 416, *Tindal, C. J.*, delivering the judgment of the court, said: "Whether there has been in any particular case reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case." On a similar point respecting notice, Lord *Mansfield*, in *Tindal v. Brown*, 1 T. R. 167, said: "What is reasonable notice is a question partly of fact, and partly of law; it may depend in some measure on facts; such as the distance at which the parties live, the course of the post, &c.; but wherever a rule can be laid down with respect to their reasonableness, *that* should be decided by the court, and adhered to for the sake of certainty." This case was sent back to the jury, on nearly the same evidence as was at first presented, and the jury having again returned a verdict contrary to the direction of the court, the court again set it aside, and ordered a third trial. In *Wyman v. Adams*, 12 Cush. 210, 214, *Shaw, C. J.*, referring to the last-mentioned case, said: "This, we believe, has been ever since considered as settling the law definitively, that what is reasonable time for making demand on the promisor and giving notice of dishonor to the indorser, is a question of law. But this rule is practically carried into effect, by stating to the jury what is reasonable time, in a case where the evidence is clear, certain, and uncontroverted, and by setting aside their verdict if it is manifest that they decided against law, in not conforming the verdict to such instructions. But where the promisor has no fixed place of abode, or where he has absconded or changed his residence, it is a very different question what shall be considered due and reasonable diligence on the part of the holder in searching or inquiring for the promisor in order to make demand. There, in the language of Lord *Mansfield*, 'no rule can be laid down'; it depends on a variety of circumstances, to be considered by the jury, under proper directions by the court as to the nature

Another thing is, that actual dishonor may take place at any moment after the paper may be presented and demanded. But this dishonor, accurately speaking, does not take place, or at least is not completed, merely by refusal to pay, unless the party subsequently taking the paper had some notice or knowledge of this demand and refusal.<sup>(k)</sup>

The third thing we have to say is this. If the paper be demanded and refused within that period before the termination of which there is no presumption of dishonor, a taker after such demand, and within that period, having no notice or knowledge of the demand or refusal, cannot be affected by it.<sup>(l)</sup> For example, suppose a note on demand so circumstanced that the court would say the lapse of one month is not sufficient to dishonor it, and the lapse of two months is sufficient, and a transferee takes it on the twenty-fifth day without notice or knowledge that on the twenty-fourth day it had been demanded and refused. We should say that the law would allow him the right of presuming non-dishonor during the whole of that month, and would protect his rights accordingly.

Paper payable at a time certain is dishonored by mere non-payment at that time; but if payable on demand, and dishonored by refusal, the question may arise, what constitutes refusal.

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and degree of the diligence required." See also *Barbour v. Fullerton*, 36 Penn. State, 105.

In the recent case of *Mullick v. Radakissen*, 9 Moore, P. C. 46, 28 Eng. L. & Eq. 86, Baron *Parke*, pronouncing the judgment of the court, said, that when there is no usage of trade to fix the time, it has long been established that what constitutes a reasonable time is a mixed question of law and fact for the determination of the court and jury.

(k) See *Bartrum v. Caddy*, 9 A. & E. 275, 278, per *Patteson*, J.; *Cripps v. Davis*, 12 M. & W. 159, 165, per *Parke*, B.

(l) So even a payment made on a note payable on demand immediately after it is signed, and not indorsed thereon, would not bind an innocent indorsee, who demands payment within a reasonable time. In *Field v. Nickerson*, 13 Mass. 131, 137, *Parker*, C. J., pronouncing the opinion of the court, said: "So we think, that he who takes, for a valuable consideration, a note of hand negotiable within a day or two after it is signed would not be subject to the claims of the promisor in nature of set-off, on the principle that the note was overdue when indorsed; because the maker gives a credit to the note for a reasonable time after it is signed; and if he should pay it immediately after, leaving the note assignable in the hands of the promisee, without any indorsement thereon, he would perhaps be holden to pay it again to the indorsee; for he would be considered as promising to pay the contents to any assignee who should, within a reasonable time, make demand of payment." See also *American Bank v. Jenness* 2 Met. 288; *Sacket v. Loomis*, 4 Gray, 148.



We should say, generally, not a mere delay or postponement for good reason, which does not amount to the expression of an intention not to pay. As if one should say, "I supposed you were to give me ten days' notice; I shall certainly be ready then"; or, "I think that is paid, as I have an offset; I will ascertain in a day or two, if you will let the note lie"; and, in either case, the delay is given. But no special words need be used to constitute refusal, if the paper is demanded, and is not paid, and there are no words which make the non-payment reconcilable with the purpose of payment within a proper time, and with a voluntary delay by the holder on this ground.

Checks, of which we speak fully elsewhere, are a peculiar instrument, and in this connection we need only remark, that they are not precisely bills, but drafts on demand. Neither sight nor demand is expressed on them; and the present form in general use in this country was in use also in England long ago. They are sometimes written payable on time, *(m)* or are post-dated, which has the same effect. *(n)* When not so written, they are payable on demand; but differ from bills on sight or notes on demand in this, — that they are not intended for circulation, and are considered dishonored at a much earlier period. That is, it is considered reasonable to require their presentation much sooner. *(o)* But, on the other hand, there is no such strict rule requiring the prompt presentment of checks as there is with respect to notes and bills of exchange payable at a time certain. *(p)* After a reasonable time has passed, they will be considered as dishonored; and what this time is must depend not only upon the nature of the instrument, but also upon the circumstances attending the particular case. *(q)* The mere fact that one takes a check six days after its date does not necessarily subject him to the equities existing against it as a dishonored paper; *(r)* though this circumstance is a proper matter of consideration in determining whether the party thus taking the check acted in good faith and

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*(m)* *Westminster Bank v. Wheaton*, 4 R. I. 30.

*(n)* *Matter of Brown*, 2 Story, 502, 512. Post-dated checks are sometimes considered payable, not as at a day certain, but on demand on or after their date. *Gough v. Staats*, 13 Wend. 549; *Mohawk Bank v. Broderick*, id. 133.

*(o)* Per *Parke*, B. in *Brooks v. Mitchell*, 9 M. & W. 15.

*(p)* Per *Maule*, J., *Serrell v. Derbyshire Railway Co.*, 9 C. B. 811.

*(q)* *Rothschild v. Corney*, 9 B. & C. 388, per Lord *Tenterden*.

*(r)* *Rothschild v. Corney*, *supra*.



with due caution, which may be the real question presented; (s) or more accurately the staleness of the check and the want of caution in taking it are of importance only in connection with the inquiry whether the holder had any knowledge of any infirmity in the title of the person from whom he took it. (t) No degree of staleness is fixed upon by the law as conclusive evidence of bad faith or fraud in the party taking the check.

As one who pays out his check may be supposed to deliver it with the expectation that it will be at once converted into money, there is perhaps no equity whatever in favor of the drawer, unless for a loss by negligence or default of the holder; but any holder

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(s) *Rothschild v. Corney*, 9 B. & C. 388, per Lord *Tenterden*.

(t) Per Lord *Brougham*, *Bank of Bengal v. Fagan*, 7 Moore, P. C. 72. A doctrine to the contrary at one time prevailed, and was the ground of the decision in *Down v. Halling*, 4 B. & C. 330. In this case, the payee of a check for £50 casually lost it; and five days after its date a woman of respectable appearance bought goods of the defendants, wholesale linen-draper and haberdashers, to the amount of £6 10s., and gave them this check; they asked her name and wrote it down, and gave her the change; the next day they presented it for payment, and the bankers paid it. Two days afterwards, the payee gave notice to the bankers not to pay it, but, finding it had been paid, called on the defendants, and brought this action for money had and received. *Abbott*, C. J. left it to the jury, whether the defendants had not taken the check under circumstances that should have excited the suspicion of a prudent man, and they found for the defendants. On a motion for a new trial, the court were satisfied that, if this was to be considered as lost by the plaintiff or stolen from him, the defendant, who took it so long after its date, must be considered as having taken it at his peril; they however doubted whether the plaintiff should not have given some evidence of losing the check; but on further consideration of that point, they thought a person who took such a check under such circumstances was bound to show that the party from whom he took it had good title to it; and as to proof of loss, it was remarked that the party losing it might in many instances be unable to prove such loss.

Where the drawer of a check did not issue it until nine months after its date, it was held, in a suit against him by an indorsee for a valuable consideration, that the check was not subject to the equities existing against it in the hands of the payee, by reason of the indorsee's taking it so many months after it was dated. Lord *Kenyon* admitted that it was to be considered as a rule, that the person who takes a bill after it is due is subject to the same equity as the party from whom he took it, though the bill did not appear upon its face to have been dishonored; and he thought there was no distinction in this respect between checks upon bankers and bills of exchange; but as the defendant had not issued this check until nine months after it was dated, he thought it was not competent for him to object to the time when the plaintiff took it. *Boehm v. Sterling*, 7 T. R. 423.

Where a bank paid a check more than a year after it was drawn, out of its own funds, on the credit of the drawer, who had paid the amount of it to the payee before it became payable, and without giving notice of the payment to the bank, it was held that the drawer was not liable to the bank for the amount so paid. *Lancaster Bank v. Woodward*, 18 Penn. State, 357.

of his check may always claim of him the full amount.<sup>(u)</sup> Any exception to this rule must arise from the peculiar circumstances of the case, and from evidence that the holder took it with knowledge that its payment might be resisted by the drawer, in whole or in part, on good grounds.<sup>(v)</sup> On the other hand, a bank always has all its equities and defences against a check, unless it be certified; and then it is as an accepted bill.<sup>(w)</sup> The exceptions to this rule also must arise from the peculiar circumstances of the case.

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(u) *Alexander v. Burchfield*, 3 Scott, N. R. 555, 7 Man. & G. 1061; *Robinson v. Hawksford*, 9 Q. B. 52; *Serle v. Norton*, 2 Moody & R. 401; *Murray v. Judah*, 6 Cowen, 490; *Little v. Phenix Bank*, 2 Hill, 426; *Daniels v. Kyle*, 1 Kelly, 304, 5 Ga. 245; *Shrieve v. Duckham*, 1 Littell, 194; *Flemming v. Denny*, 2 Philad. 111, 13 Leg. Intelligencer, 140; *Pack v. Thomas*, 13 Smedes & M. 11; *East River Bank v. Gedney*, 4 E. D. Smith, 582; *Smith v. Janes*, 20 Wend. 192; *Matter of Brown*, 2 Story, 516; *Morrison v. Bailey*, 5 Ohio State, 13, per *Beatty*, J; *Tryon v. Oxley*, 3 Iowa, 289; *Foster v. Paulk*, 41 Maine, 425; *Harbeck v. Craft*, 4 Duer, 122; *Hoyt v. Seeley*, 18 Conn. 353.

In *Alexander v. Burchfield*, *supra*, *Patteson*, J. said: "As between the drawer of a check and the holder, if presentment is deferred to such a time that inconvenience has been sustained, the time may be deemed unreasonable; but if none has resulted, I see nothing unreasonable in a presentment, I should even say, at any time within six years." A similar statement was made by *Creswell*, J. in *Laws v. Rand*, 3 C. B. n. s. 442. In *Mullick v. Radakissen*, 9 Moore, P. C. 46, 28 Eng. L. & Eq. 86, *Parke*, B. said that a check "is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the check must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, and not elsewhere, who has no right to insist on immediate presentment at that place." In a few cases, the drawer of a check payable at a future day has been considered conditionally liable, and discharged for want of due diligence in making presentment and giving notice of dishonor, though he has suffered no loss. *Bradley v. Delaplaine*, 5 Harring 305; *Glenn v. Noble*, 1 Blackf. 104. This doctrine, however, cannot be supported on authority or principle.

(v) *Anderson v. Busteed*, 5 Duer, 485. See also *Thompson v. Hale*, 6 Pick. 259.

(w) *Robson v. Bennett*, 2 Taunt. 388; *Barnet v. Smith*, 10 Foster, 256; *Willet v. Phoenix Bank*, 2 Duer, 121; *Farmers' & Mechanics' Bank of Kent Co. v. Butchers' & Drovers' Bank*, 4 Duer, 219; s. c. in Court of Appeals, 4 Kern. 623. See also *Mussey v. Eagle Bank*, 9 Met. 306; *Hern v. Nichols*, 1 Salk. 289; *Bank of Republic v. Baxter*, 31 Vt. 101.

After a bank has certified a check, it can no more impute delay to the holder in presenting the check for payment, than it can to the holder of one of its own notes; for the bank then becomes the principal debtor, and can set up no equities against the check. *Willet v. Phoenix Bank*, 2 Duer, 121. If the drawer of a check procures it to be certified by means of fraudulent representations, the bank may reclaim the check or the money represented by it, unless it has previously been transferred or paid to one who has no notice of such fraud. *Bank of the Republic v. Baxter*, 31 Vt. 101.

Bank-bills are never dishonored by mere lapse of time. They are usually protected by statute, even against the statute of limitations, and are good as against the bank which issues them at any subsequent period. Even if the bank be broken, and the bills have been demanded and refused, they are still salable, and very frequently sold and resold; and the purchaser acquires all the rights of a holder as against the bank or upon its assets.

What rights the holder has against the party from whom he received old bills, or bills of insolvent banks, will be considered in the chapter on Payment by Bill or Note.

### SECTION III.

#### AGAINST WHAT DEFENCES A BONA FIDE HOLDER IS PROTECTED.

THE subject of this section might have been said, quite as accurately, to be the peculiar privileges or rights which a *bona fide* holder of negotiable paper has, although his transferrer did not himself possess them. In the first place it should be remarked, that in this sense, and for this purpose, no one is a *bona fide* holder who did not take the paper for value before its dishonor; that is, before its maturity, if payable at a time certain; or within a reasonable time, if payable on demand; or before actual demand and refusal, and notice or knowledge thereof.

For every holder of negotiable paper who takes it after dishonor takes it subject to all equities; or rather, to all defences which could have been made to the paper if it had not been transferred to him.

It was a rule of the court of chancery, coeval with the introduction of uses and trusts, that a purchaser of property in good faith, for a valuable consideration and without notice of any equities or trusts to which it was subject in the hands of his vendor, took the property free and discharged from all these equities and trusts. This rule, however, was strictly confined to choses in possession; because choses in action were not legally assignable. Hence the assignee of a chose in action had no legal title, but only an equitable title; and when his equitable title comes into conflict with the equities of other parties, the universal rule of chancery prevailed, by force of which, as between

equal equities, that which is prior in time is prior in right. Now negotiable paper is in this respect an exception to the law of choses in action. It may be assigned by indorsement or delivery, and the assignee acquires a legal title as complete as the assignee of choses in possession. Thus, the reason for excluding from the rule negotiable paper wholly failed; and in addition, its peculiar nature and function absolutely required that a *bona fide* holder should be fully protected. Accordingly, courts of law have for a long period in England, and always here, extended to the *bona fide* holder of negotiable paper a similar protection to that which chancery gave to the assignee of choses in possession. For the application of this important rule, it must be remembered that no holder is entitled to its benefit who has not a complete *legal* title to the paper; and we shall presently see how many transfers of negotiable paper this necessity of *legal* title opens to all equitable defences.

As no one is a *bona fide* holder in this sense who has notice of a defence against the paper, no one who takes it after dishonor is such *bona fide* holder, because the dishonor itself is notice to him that there is some defect or defence. Hence the rule, that one who takes paper for value after dishonor is open to all equitable defences.(x)

It is certain that, by the general course and weight of the authorities, one who takes paper after dishonor is subject to all equities; and he who takes it in good faith for value before dishonor is subject to no equities. What these equities are, we shall consider fully hereafter in the chapter on Defences.

The *bona fide* holder of negotiable paper before dishonor is *not* protected against those defences which go to the *essence* of the paper, and either by common law or statute annul and avoid the contract, or which interfere with and prevent his acquiring a *legal title* to the paper.(y) Thus a person whose name is forged,(z)

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(x) *Brown v. Davies*, 3 T. R. 80, per *Buller*, J.; *Beck v. Robley*, 1 H. Bl. 89, note a; *Little v. Dunlop*, *Busbee*, 40; *Williams v. Nicholson*, 25 Ga. 560; *Howard v. Ames*, 3 Met. 308; *Mackay v. Holland*, 4 Met. 69; *Potter v. Tyler*, 2 Met. 58; *M'Neill v. M'Donald*, 1 Hill, S. Car. 1; *Mosteller v. Bost*, 7 Ired. Eq. 39; *Connery v. Kendall*, 5 La. Ann. 515; *Sawyer v. Hoovey*, 5 La. Ann. 153; *Lancaster Bank v. Woodward*, 18 Penn. State, 357; *Clay v. Cottrell*, 18 Penn. State, 408; *Baker v. Wheaton*, 5 Mass. 509; *Bond v. Fitzpatrick*, 4 Gray, 89.

(y) See *supra*, pp. 217, 218.

(z) *Canal Bank v. Bank of Albany*, 1 Hill, 287.

or whose note is materially altered, (a) is never liable to the parties who took the paper innocently and for value on the credit of his name; unless his own default was a cause of the forgery or alteration, (b) or of the taking by the holder, in the belief that the paper was genuine. So, wherever a note tainted with usury is thereby annulled, it has no force between any subsequent parties. (c) And if the paper be illegal on any ground which makes it null and void as between the original parties, it is equally void in the hands of subsequent parties. (d) A distinction may perhaps be taken between notes obtained by fraud and those obtained by force or duress. In the former case, we should say that the defrauded party would generally be liable to a *bona fide* holder. But a note or bill obtained by duress might not be available in any hands against the party so compelled; and if the note were a good note, and a subsequent party indorsed it by duress, he would not be bound to any one; but a subsequent indorsee, who indorsed it over for value, would be bound to his own indorsee, or to those deriving title from him. But we are not aware that this question has been determined by authority. (e)

In the next place, a *bona fide* holder is not protected against the defence of incapacity, if that be complete, however it be created. Thus an infant, (f) or married woman, (g) or luna-

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(a) *Master v. Miller*, 4 T. R. 320; *Woodworth v. Bank of America*, 19 Johns. 391; *Clute v. Small*, 17 Wend. 238; *Nazro v. Fuller*, 24 Wend. 374; *Bruce v. Westcott*, 3 Barb. 374. See *Lisle v. Rogers*, 18 B. Mon. 528; *Bumpass v. Timms*, 3 Sneed, 459.

(b) As where a blank is carelessly left. See *supra*, pp. 109–113, 115; *Isnard v. Torres*, 10 La. Ann. 103.

(c) *Ramsdell v. Morgan*, 16 Wend. 574; *Keutgen v. Parks*, 2 Sandf. 60; *Clark v. Loomis*, 5 Duer, 468. In *Hall v. Wilson*, 16 Barb. 548, it was held that the discount or purchase of a stolen note at a greater discount than the legal rate renders the transaction usurious and the note void, notwithstanding the transaction is in form a purchase of the note of a person other than the maker, who represents it to be a business note and valid. The note in this case was for \$120, payable to A or bearer. It was stolen by a laborer, and transferred to B for \$115, who transferred it before maturity to the plaintiff. *Held*, that the plaintiff could not recover.

(d) See *supra*, p. 214. *Weed v. Bond*, 21 Ga. 195.

(e) In *Duncan v. Scott*, 1 Camp. 100, the action was brought by the indorsee of a bill against the drawer. It was held, that if it appeared that the defendant drew without consideration and under duress, it was incumbent on the plaintiff to prove that he gave value for it, although it was indorsed before due. This case seems to place duress on the same footing as fraud, in which case, as we have seen, a *bona fide* holder may recover.

(f) See *supra*, p. 67, note f; p. 69, note k.

(g) See *supra*, p. 79.

tic,(h) or spendthrift under guardianship, would not be held by his signature, to any person, however innocently he became the holder.

The same rule must apply to the case of a supposed agency, without any real or sufficient authority. For if A signs paper as the agent of B, B does not sign it, nor can he be affected with any of the liabilities of signature, unless A was his agent, either on the ground that he had actual authority from B, or that B, without giving this authority, had so spoken or acted as to justify the holder, or some one from whom he derives title, in the belief that B had given A this authority. For, as we have already seen, A would be equally the agent of B in law, on either of these grounds.(i)

Either of these incapacities, or indeed any other, may operate against the claim of the holder in either of two ways. If the incapacity attended the making of the note, then the infant, or lunatic, or married person, or person under guardianship, or unauthorized principal, will not be held; but subsequent parties who are not incapacitated may be held to a *bona fide* indorsee who is subsequent to them.(j) On the other hand, if the paper is free from all objection of this kind until the last indorsement, and that is tainted by any such incapacity, the holder acquires no legal title, and no rights to the paper or against any parties upon the paper.

There is another broad distinction in respect to the rights of the *bona fide* taker, which should be distinctly apprehended. It is this. He receives at his own peril all negotiable paper which is assigned to him by written transfer, and cannot be assigned to him by delivery only. Whereas he is generally protected as the holder of paper transferable by delivery. Thus, one steals or finds a note negotiable by indorsement, and forges the indorsement; now the holder by this title can make no claim against any one, because the written transfer confers no title upon him. And this is true if the finder or thief happened to have the same name

(h) See *supra*, p. 150, note p.

(i) See *Weathered v. Smith*, 9 Texas, 622; and *supra*, pp 118 - 120.

(j) In *Erwin v. Downs*, 15 N. Y. 575, a note was made by two married women, and indorsed by the defendant for their accommodation. It was held that the defendant was liable to a *bona fide* holder, although he knew at the time that the makers were married women.

with the previous payee or indorsee, and therefore wrote his own name upon the paper, because the question always is, Had the indorser the legal power and right to transfer the paper by his indorsement? for if not, the holder derives no title from his indorsement.

It may be well to remark, that although negotiable paper payable to order is not transferable by delivery only, but becomes so transferable by an indorsement payable to bearer, or by an indorsement in blank, yet a *bona fide* holder of such paper by delivery only is protected against everything subsequent to the delivery of the paper, if it is afterwards indorsed to him, the indorsement relating back to the time of delivery, as to any equity outside of the note itself.(*k*)

But if the paper is originally made negotiable by delivery, or becomes so by indorsement in blank, then it is in the power of any party, however wrongful his possession, to do all that is necessary to transfer the property; for delivery is of itself sufficient. Hence the holder takes now only the risk of his own honesty; for although his transferrer had himself only possession, and would have made no title whatever as against any prior party, the paper is nevertheless so far like money in his hands, that his innocent transferee for value acquires full property in it, and all the rights incidental to this property.(*l*)

If A holds paper indorsed to him, and B steals or finds it and forges A's indorsement to himself, and then indorses it for value to C, C to D, D to E, &c., each of these parties has a valid claim on B, and on all prior parties as far back as B; but no one of them has any claim against A, the original owner, or any party before B. The true owner has never lost his property in the paper, but may still enforce his rights under it, in the manner prescribed for a lost note, against all who were parties when he lost it.(*m*)

It should be added, that if paper properly assignable only by indorsement be delivered without indorsement, the transferee has but an equitable title. He may have, however, a right to a legal title, and therefore to an indorsement, if this be necessary

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(*k*) *Ranger v. Cary*, 1 Met. 369 The court appear to limit the rule to the case of an equity outside of the note itself.

(*l*) *Caruth v. Thompson*, 16 B. Mon. 572.

(*m*) See *supra*.



to make his title legal ; and a court of equity would compel such indorsement. And we should say that the indorsee would then have the same rights and the same protection as if the indorsement had been made at the time of the assignment ; because it would relate back to that time, as it is given now only because it ought to have been given then. The absence of indorsement is a merely technical objection ; for the actual transfer for value passes the property in the paper substantially, and the indorsement is needed only to make that transfer formal. (*n*)

It will follow from what has been already said, that if a *bona fide* holder has acquired a perfect legal title, and the instrument is not made void by statute, and the parties to it are under no personal disability, he holds the paper subject to very few, and we might almost say to no defences whatever. Thus, it is no sufficient defence against him, that there was no original consideration ; (*o*) or that the consideration has failed ; (*p*) or that the consideration was illegal, as where the note was given for liquors sold contrary to law ; (*q*) or on an agreement not to further prosecute the maker on a complaint for adultery with the wife of the payee ; (*r*) or for procuring the legislature to pardon a convict ; (*s*) or that the note was given as an escrow ; (*t*) or that the indorsement grew out of an illegal transaction, or was obtained by fraud ; (*u*) or that the note was obtained by fraud or

(*n*) See *supra*, note *k*.

(*o*) See p. 186, note *f*; *Martin v. Hamilton*, 5 Harring. Del. 314.

(*p*) See p. 188, note *g*.

(*q*) Most of the statutes against selling liquors provide that the note shall be void between the original parties, but valid in the hands of a *bona fide* holder without notice. The Massachusetts act provides that such notes "shall be void against all persons holding the same with notice of such illegal consideration, either direct or implied by law." Under this statute it has been held that, if the defendant shows that a note was given for liquor, the plaintiff must prove that he took it without notice. *Holden v. Cosgrove*, Suffolk, Nov. 1858 ; *Sisternans v. Field*, Bristol, Oct. 1858 ; *Barnard v. Flint*, Berkshire, 1860. And see *Paton v. Coit*, 5 Mich. 505 ; *Wyat v. Campbell*, *Moody & M.* 80. See also, generally, *Doe v. Burnham*, 11 Foster, 426 ; *Johnson v. Meeker*, 1 Wis. 436 ; *Norris v. Langley*, 19 N. H. 423.

(*r*) *Clark v. Ricker*, 14 N. H. 44.

(*s*) *Meadow v. Bird*, 22 Ga. 246.

(*t*) *Vallett v. Parker*, 6 Wend. 615.

(*u*) *Humphrey v. Clark*, 27 Conn. 381. So, if a party makes or indorses a note, for the purpose of its being used in a particular way, he takes the risk of its being used in a different way, and cannot refuse to pay it to any *bona fide* holder into whose hands it may come. *Sweetser v. French*, 2 Cush. 309, 313.

stolen ; (*v*) or that it has been already paid to the original payee, or to some just holder ; (*w*) or that the instrument was delivered to the payee in blank, with authority to insert a certain sum, and that he has inserted a much larger sum. (*x*) In all of these cases, the courts will afford no remedy to the payee, or to any subsequent party chargeable with notice or knowledge of the defence ; but the paper is not absolutely void, and the *bona fide* holder is protected against all these defences.

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(*v*) Gould *v.* Segee, 5 Duer, 260 ; Powers *v.* Ball, 27 Vt. 662 ; Humphrey *v.* Clark, 27 Conn. 381 ; Kelly *v.* Smith, 1 Met. Ky. 313 ; Peacock *v.* Rhodes, 2 Doug. 633.

(*w*) See *supra*, p. 230, note *w* ; Griswold *v.* Davis, 31 Vt. 390.

(*x*) See Putnam *v.* Sullivan, 4 Mass. 45 ; Griggs *v.* Howe, 31 Barb. 100, affirmed, Van Duzer *v.* Howe, 21 N. Y. 531 ; and *supra*, p. 115.

## CHAPTER IX.

## ACCEPTANCE.

ACCEPTANCE may be defined to be an agreement to comply with the request contained in a bill of exchange.<sup>(y)</sup> It may be express or implied; verbal or written; prior to drawing the bill; before or after maturity; absolute, qualified, or conditional; by all the drawees, by a part of them, or by one who is not a drawee, if he accepts for the honor of the drawer or any indorser. The acceptance is complete when in exact conformity with the tenor of the bill; qualified, when it is an agreement to pay the bill, but at a different time, place, or in a different manner from the tenor thereof; conditional, when the obligation of payment is to commence on the happening of some event or circumstance. We will first consider what constitutes acceptance.

## SECTION I.

## WHAT CONSTITUTES ACCEPTANCE.

THE usual manner of accepting is for the drawee to write across the face of the bill, frequently in red ink, the word "Ac-

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(y) "An acceptance is an engagement to pay a bill according to the tenor of the acceptance." Bayley, c. 6, § 1; Kyd, c. 6; Edwards, p. 405. "The act by which the drawee evinces his consent to comply with, and be bound by, the request contained in the bill of exchange directed to him, or, in other words, it is an agreement to pay the bill when due." Chitty, p. 280. "An assent and agreement to comply with the request and order contained in the bill, or, in other words, it is an assent and agreement to pay the bill, according to the tenor of the acceptance, when due." Story, § 238. "An engagement to pay the bill when due." *Lawrence, J., Clarke v. Cock*, 4 East, 57, 72. "An engagement of the one party acceding to the proposition of the other." *Bayley, J., Jenne v. Ward*, 1 B. & Ald. 653, 659. "An engagement by the drawee to pay the bill when due in money." Byles, p. 142. The objections to this last definition are, that an acceptance may be by a person other than the drawee, as in the case of an acceptor for honor; that the words "when due" are hardly correct, as an acceptance after maturity is valid; and that "in money" is surplusage, because, a bill of exchange being a written order for the payment of money, an engagement to pay the bill must be to pay in money, for a bill not payable in money is not a bill of exchange.

cepted," and sign his name to this. It is certainly sufficient if stamped or printed on the bill, (z) and probably sufficient if written in pencil. (a) The date is immaterial, unless the bill is payable so many days after sight, or after acceptance; in that case it usually is, and always should be, added; but if not added, the actual date may be shown by evidence; and will then have the same effect as if it were written. (b) No special form or manner or words of acceptance are necessary; (c) nor is the signature of the drawee essential, although usual and proper. (d) The rule seems to be, as drawn from the authorities and the reason of the case, that if a bill is presented to a drawee for the purpose of obtaining his acceptance, and he does anything to or with it which does not distinctly indicate that he will not accept it, he is held as an acceptor; for he has the power, and it is his duty, to put this question beyond all possibility of doubt. (e) Thus "Accepted," without a signature, (f) or even "Presented," (g) or "Honored," (h) or "I will pay the bill," (i) or

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In *Petit v. Benson*, Comb. 452, it is assumed that an acceptance payable half in money and half in bills is valid as to the part payable in money, and not as to the part payable in bills. An acceptance must be to pay in money; an acceptance to pay by another bill is no acceptance. *Russell v. Phillips*, 14 Q. B. 891. An acceptance is not a collateral promise to pay the debt of another within the statute of frauds. *Raborg v. Peyton*, 2 Wheat. 385; *Fisher v. Beckwith*, 19 Vt. 31. See *Storer v. Logan*, 9 Mass. 55, 60.

(z) See *Schneider v. Norris*, 2 Maule & S. 286.

(a) *Supra*, p. 21, note y.

(b) *Kenner v. Creditors*, 20 Mart. La. 36, 1 La. 120. See *Glossop v. Jacob*, 4 Camp. 227.

(c) *Spear v. Pratt*, 2 Hill, 582, where the signature of the drawee across the face of the bill was held a valid acceptance, even under the statute requiring acceptances to be in writing and signed.

(d) *Phillips v. Frost*, 29 Maine, 77; *Dufaur v. Oxenden*, 1 Moody & R. 90. In this case it was left to the jury to decide whether the acceptance was complete, and they decided that it was.

(e) See *Cowen, J.*, *Spear v. Pratt*, 2 Hill, 582; *Harvey v. Martin*, 1 Camp. 425, note; *Jeune v. Ward*, 2 Stark. 326.

(f) See *supra*, note d.

(g) *Holt, C. J.*, *Anonymous*, Comb. 401.

(h) *Story on Bills*, § 243.

(i) *Ward v. Allen*, 2 Met. 53; *Lord Ellenborough, C. J.*, *Wynne v. Raikes*, 5 East, 514; *Leach v. Buchanan*, 4 Esp. 226. In *Edson v. Fuller*, 2 Foster, 183, a parol promise "to settle" a note was held a valid acceptance of an order indorsed upon it for the amount due. So where the cashier of a bank pronounced a check drawn upon it "good." *Barnet v. Smith*, 10 Foster, 256. Where the drawee wrote on the back of a bill, "I will see the within paid eventually," and signed it, it was held a valid accept

“Seen,”(*j*) or the day and month when presented,(*k*) or a written direction by the drawee to some other person to pay the bill,(*l*) or the mere signature of the drawee,(*m*) have been held equivalent to an acceptance. Probably if it could be shown by evidence that any of these acts, which might be considered ambiguous, was not intended to be taken as an acceptance, and in fact was not so taken, and that there was no fraudulent design, such act or word would not bind as an acceptance. It has indeed been said, that “I will not accept this bill,” being written upon it, is, *by the custom of merchants*, a good acceptance. But it is incredible that such a mode of acceptance should ever be customary, and it is difficult to maintain such a rule of law. If the refusal were fraudulent, and intended to be understood as an affirmative acceptance, and was, in fact, so understood, there would undoubtedly be some adequate remedy against the perpetrator of the fraud; but even then it would not be easy, on legal principles, to make this an acceptance.(*n*)

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ance binding forthwith. *Brannin v. Henderson*, 12 B. Mon. 61. See also *infra*, §§ 2, 3. A statement by the drawee of a bill to a third party, not privy to the bill, nor an agent of any one interested in it, that he “must pay,” or “would have to pay” it, is not an acceptance, nor admissible alone as evidence from which a jury may find an acceptance. *Martin v. Bacon*, 4 Const. R. 132. A bill had been left with the drawee for acceptance. The drawee subsequently returned it to the holder’s clerk, saying, “There is your bill; it is all right.” Held by Lord *Kenyon* as evidence of acceptance. *Powell v. Jones*, 1 Esp. 17. It has been said, that whether there has been an acceptance or not is a question of law upon the facts found. *Barnet v. Smith*, 10 Foster, 256; *Edson v. Fuller*, 2 id. 183; *Spront v. Matthews*, 1 T. R. 182. If the drawee says he cannot accept until further directions from A, and A afterwards desires him to accept and draw upon B for the amount, the mere drawing upon B is not an acceptance until the bill is accepted by B. *Smith v. Nissen*, 1 T. R. 269.

(*j*) *Eastman, J.*, *Barnet v. Smith*, 10 Foster, 256; *Cowen, J.*, *Spear v. Pratt*, 2 Hill, 582.

(*k*) *Holt, C. J.*, *Anonymous*, Comb. 401. In *Powell v. Monnier*, 1 Atk. 611, the defendant received the bill before it was due, kept it ten days, entered it in his bill-book under a particular number, marking that number and a date upon the bill, and wrote to the drawer that the bill “should be duly honored and placed to his debt.” Lord *Hardwicke* observed: “Now it has been said to be the custom of merchants, that, if a man underwrites anything, let it be what it will, it amounts to an acceptance; but if there was no more than this in the case, I should think it of little avail to charge the defendant.” The letter was, however, held to amount to an acceptance.

(*l*) *Moor v. Wilhy*, Buller, N. P. 270.

(*m*) *Spear v. Pratt*, 2 Hill, 582.

*n*) *Lumley v. Palmer*, Cas. Temp. Hardw., London ed., 74. But in *Bayley on Bills*, 164, note (2d Am. ed.), it is added: “But by Lord *Mansfield*, in *Peach v. Kay*, in sittings after Trinity term, 1781, ‘it was held by all the judges, that an express refusal to accept, written on the bill, where the drawee apprised the party who took it away what

That a drawee may refuse acceptance is certain ; and bills are every day protested in all commercial cities for non-acceptance. But it would seem that the proper and only safe way of non-accepting is to make a positive refusal in words, but without writing. Even if a drawee silently detains a bill for a considerable time, it has been said that this act might be regarded as an acceptance. We think, however, both on authority and on reason, that mere detention or delay should not, of itself and alone, be considered as the equivalent of acceptance ; but that any unreasonable delay which caused injury to the holder without his fault, or which, from the circumstances, justified the holder in believing that the bill was accepted, would bind the drawee as by an acceptance.<sup>(o)</sup> We should say that some duty lay upon the holder to inquire after his bill, and know why it was silently detained ; and the cases sometimes indicate this.<sup>(p)</sup> And it has been held that the destruction of a bill by the drawee, when the bill was left for acceptance, bound him as an acceptor ; <sup>(q)</sup> but

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he had written, was no acceptance ; but if the drawee had intended it as a surprise upon the party, and to make him consider it as an acceptance, they seemed to think it might have been otherwise.' " See *supra*, p. 26, note *u*.

(*o*) In *Harvey v. Martin*, 1 Camp. 425, note, the drawer sent a bill to the drawee, requesting him to accept and send it to the plaintiff, the payee. Two weeks after, the drawer, learning that the bill had not been received by the payee, wrote asking him again to accept and send the bill, saying that detention would be considered as equivalent to acceptance, but that the payee would not give credit till the bill was received. After some time the drawee informed the drawer that he had intended to pay it, but now refused, as he had no funds of the drawer in his hands. The reports of this case are somewhat conflicting and unsatisfactory, but it seems that detention alone would have been deemed sufficient. See *Jeune v. Ward*, 2 Stark. 326, note, 1 B. & Ald. 653. The length of time during which a bill may be retained without any presumption of acceptance may be controlled by the usage of trade. See *Fernandey v. Glynn*, 1 Camp. 426, note ; *Mason v. Barff*, 2 B. & Ald. 26. *Abbott, C. J.* said, that the doctrine that detention for an unreasonable time amounts to acceptance "is not supported by the authority of any decided case, for the cases have all been decided upon very special circumstances." See also *Clavey v. Dolbin*, Cas Temp. Hardw, Dublin ed., 264. In *Koch v. Howell*, 6 Watts & S. 350, it was contended that the retention of an order by the drawee until the trial, without informing the payee of any determination to accept, amounted to an acceptance at law. But the court held otherwise, and that it was a question for the jury to consider. In some States there are statutory provisions on this subject. See *infra*, p. 285, note *u*.

(*p*) *Jeune v. Ward*, 1 B. & Ald. 653, 659, per *Bayley, J.*

(*q*) *Jeune v. Ward*, 2 Stark. 326. In this case the payee of a bill presented it for acceptance, but the drawee refused. The bill was however left with him. The payee afterwards took further steps towards obtaining the money by negotiation, and finally the drawee destroyed the bill, having retained it in his hands for more than a month

there seems no necessity for such an extraordinary construction, for other and more appropriate forms of action would afford as complete a remedy for the wrong done. If, after a positive refusal to accept, the holder leaves the bill with the drawee, neither his retaining it, nor, it is said, his destruction of it, will amount to an acceptance.<sup>(r)</sup> It seems now to be settled on authority, and perhaps for sufficient reason, that an acceptance need not be in writing,<sup>(s)</sup> or, if in writing, need not be on the bill itself,<sup>(t)</sup> except where this is required by statutory provisions, as stated in our notes.<sup>(u)</sup> Words, however, which are to have this effect, if

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Lord *Ellenborough* ruled at *Nisi Prius* that the destruction of the bill, under the circumstances, was equivalent to an acceptance, and a verdict was rendered against the drawee. The verdict was afterwards set aside by the Court of King's Bench, Lord *Ellenborough* dissenting, 1 B. & Ald. 653. Lord *Ellenborough*, in his opinion on the motion to set aside the verdict, seems to lay more stress on the circumstances, aside from the destruction of the bill, than in his opinion at *Nisi Prius*, and he observes: "If indeed the bill had not originally been left for acceptance, the whole case would certainly fall to the ground. But I think it clearly appears from the evidence, that it was so left, and the defendant, not having in a reasonable time notified his refusal to accept, and having ultimately destroyed the bill, must, as it seems to me, be held liable for it as the acceptor." But the other judges doubted whether the bill was left for acceptance, and declined to decide the question as presented by Lord *Ellenborough*. There is much difficulty in ascertaining from the reports of this case what were the real facts upon which the opinions of the court were based; and intimations are given of a disposition to limit the doctrine of constructive acceptances, and even of regret that it had been carried so far. *Abbott, J.* remarked: "I look with the greatest anxiety at these cases of constructive acceptance, for every decision of that kind introduces uncertainty upon a subject where the public interest requires that the greatest certainty should prevail. If indeed it were *res integra*, it would be most desirable that the liability of the acceptor should be confined to the case of an actual acceptance on the face of the bill. I own, I wish the rule had been so laid down originally." So *Lawrence J.*, *Clarke v. Cock*, 4 East, 57; Lord *Kenyon, C. J.*, *Johnson v. Collings*, 1 East, 98. This subject has been regulated by statute in many States, as will appear hereafter.

(r) This seems to have been conceded by the whole court in *Jeune v. Ward*, 1 B. & Ald. 653

(s) *Lumley v. Palmer*, Cas Temp. Hardw., London ed., 74, 2 Stra. 1000; *Julian v. Shobrooke*, 2 Wils 9; *Miln v. Prest*, Holt, N. P. 181, 4 Camp. 393; *Fairlee v. Herring*, 3 Bing. 625, 11 J. B. Moore, 520; *Sproat v. Matthews*, 1 T. R. 182; *Walker v. Lide*, 1 Rich. 249; *Fisher v. Beckwith*, 19 Vt. 31; *Ward v. Allen*, 2 Met. 53; *Grant v. Shaw*, 16 Mass. 341; *Edson v. Fuller*, 2 Foster, 183; *Barnet v. Smith*, 10 id. 256; *Leonard v. Mason*, 1 Wend. 522; *Ontario Bank v. Worthington*, 12 Wend. 593; *Williams v. Winans*, 2 Green, N. J. 339. But see *Bank of Ireland v. Archer*, 11 M. & W. 383, in which the accuracy of the report of *Miln v. Prest*, as given in Holt, N. P. 181, is doubted.

(t) *Billing v. Devaux*, 3 Man. & G. 565; *Hatcher v. Stalworth*, 25 Missis. 376.

(u) In Alabama, an acceptance must be in writing, and signed by the acceptor or his agent, Code, 1852, § 1532; so in California, Comp. L. 1853, c. 27, §§ 6, 7; in Mis-



only spoken, should be clear and explicit; (v) and if written, but not on the bill, they should be similar words, and should be written on some paper which distinctly relates to the bill. For this purpose a receipt, memorandum, or letter might suffice. (w)

To all this, however, there is one important exception. If the drawee accepts in writing on the bill, he is held without any reference to the person making the request. But if the acceptance is only in words spoken, they have no such effect, unless spoken to one then having an interest in the bill, or subsequently acquiring an interest on the credit and influence of the words so spoken. (x) If the words are written, but not on the bill, the rule must be substantially the same; but the writer, because he has given permanence and transferableness to his words, might be held to any *bona fide* holder of the bill to whom they were communicated. Sometimes the course of dealing between the parties has an important effect. Thus, where the drawer advised the drawee of the bill by letter, and the drawee replied that "the bill shall have attention," it was held that these words taken by themselves were not sufficiently positive and unequivocal to amount to actual acceptance; but that if it could be shown that such words were used for that purpose, and with that effect, in dealings between the parties, then they might be regarded as an acceptance. (y)

We shall see that a bill must be presented for acceptance, under penalty of certain consequences; but it does not seem that an acceptance, distinctly made, under circumstances indicating that the drawee knew precisely what bill he was accepting,

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souri, R. S. 1835, p. 97; in Wisconsin, R. S. 1858, c. 60, § 7; and in New York, R. S. pt. 2, c. 4, tit. 2, §§ 6, 7. It is enacted also in the latter State and in California, that if the acceptance is written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration. See *Luff v. Pope*, 5 Hill, 413, 7 id. 577.

In England, by Stat. 1 and 2 Geo. IV. c. 78, an acceptance of an inland bill must be in writing, on the bill itself, or on a part of it, if a set of exchange. This is re-enacted and extended to Ireland by Stat. 9 Geo. IV. c. 24, § 8; so in New Brunswick, R. S. 1854, c. 116, § 4.

(v) *Supra*, p. 282, note i; *Rees v. Warwick*, 2 B. & Ald. 113.

(w) See *Pillans v. Van Mierop*, 3 Burr. 1663; *Pierson v. Dunlop*, Cowp. 571; *Powell v. Monnier*, 1 Atk. 611; *Mason v. Hunt*, 1 Doug. 297.

(x) See *Martin v. Bacon*, 4 Const. R. 132.

(y) *Rees v. Warwick*, 2 Stark. 411, 2 B. & Ald. 113. See *Parke, J., Fairlee v. Herring*, 3 Bing. 631.

would be invalid, merely because the bill was not actually shown and presented.(z) If it is presented, then — when no statute intervenes — the general rule is, that any conduct of the drawee from which the holder is justified in drawing the conclusion that the drawee intended to accept the bill, and intended to be so understood, will be regarded as an acceptance.

On this ground it has been decided that a letter from the drawee to the drawer, the latter being dead and the former not knowing this fact, might be treated as an acceptance.(a) The death of the drawer is no objection whatever to an ordinary acceptance by the drawee, whether with or without knowledge ; for the death is no revocation of the bill, if it has passed into the hands of a holder for value.(b) It seems that bills are sometimes

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(z) *Fisher v. Beckwith*, 19 Vt. 31. See *Clarke v. Cock*, 4 East, 57 ; *Cox v. Coleman*, Chitty on Bills, 288.

(a) *Billing v. Devaux*, 3 Man. & G. 565.

(b) *Cutts v. Perkins*, 12 Mass. 206. In this case the drawer, a master of a vessel, having received goods on board, drew on the consignee for the amount of the freight to become due on the completion of the voyage, in favor of a creditor. The master died, his estate being insolvent. The consignee accepted the draft and paid the bill with knowledge of the drawer's death. The administrator sued the consignee for the freight but was not allowed to recover.

Chitty, p. 282, says : " It should seem that where a bill has been drawn in payment of a debt from the drawer to the payee, the drawee may legally accept the bill after notice of the death of the drawer, such death not revoking the order given in favor of a bona fide creditor." And on p. 287 : " If a person draw a bill of exchange on another, and deliver it to the payee for a sufficient consideration, and the drawer then die, it should seem that this, having been an appropriation of a particular fund for the benefit of the payee, the death would be no revocation of the request to accept, and that the drawee may accept and pay." The principal authority cited is *Tate v. Hilbert*, 2 Ves. Jr. 118. *Byles*, p. 17, says : " It seems that the death of the drawer of a check is a countermand of the banker's authority to pay it. But that if the banker do pay the check before notice of the death, the payment is good." The authority cited is also *Tate v. Hilbert*. These two propositions are irreconcilable. It will be observed that, although in *Cutts v. Perkins*, 2 Mass. 206, the draft was drawn for the whole of a fund, yet, in considering the question whether the draft amounted to an assignment, the court thought it unnecessary to consider whether it was a bill of exchange or not. The question as to how far a bill of exchange or a check operates as an assignment is considered subsequently. The correct doctrine, it will be seen, is, that after acceptance the bill is considered as an assignment. Hence the question, on the point now under consideration, is whether the death of the drawer, after he has given up all control over that part of the fund in the hands of the drawee which is equal to the amount of the bill, can have any effect on the right of the drawee to do all that is wanting to make the bill a complete assignment. This right on the part of the drawee to complete the assignment would seem to be a privilege of his own, and it is somewhat difficult to see how the death of the drawer can affect it. The drawer has given the holder a written instrument, authoriz-

drawn directing the drawee to pay "without acceptance." Such an instrument is still a bill of exchange,<sup>(c)</sup> and it has been said that these words merely permit the holder to make no presentment for acceptance until the bill has become payable.<sup>(d)</sup> It may be, however, that such words are used to insure the holder against any ill effect of want of presentment for acceptance. It has been said, also, that these words would exempt the drawer from liability to pay merely on non-acceptance, leaving him liable, of course, on non-payment.<sup>(e)</sup>

There is a class of cases in which the act of drawing itself constitutes acceptance; as where a person draws a bill upon himself;<sup>(f)</sup> or does not address it to any one;<sup>(g)</sup> or where a partner draws, in his own name, upon the firm of which he is a member for partnership purposes;<sup>(h)</sup> or where a bill is drawn by an officer of a corporation, legally authorized so to do, on the corporation.<sup>(i)</sup> Such instruments are, however, in legal effect promissory notes.

If a party accepts a bill in which no drawee is named, and there is nothing in the bill to indicate that the party accepting is not the drawee, this acceptance operates, generally at least, as an admission by him that he is the drawee. We should say that the bill should then be considered complete, and he be held

ing the latter to apply to the drawee for the assignment of certain funds. The holder, if the bill was received for a sufficient consideration, has an interest in this authority, — not merely in the proceeds of the bill, but in the bill itself (see the distinction taken by *Marshall*, C. J., in *Hunt v. Rousmanier*, 8 Wheat. 201); and the rule is, that an authority coupled with an interest is irrevocable.

(c) And may be so described in an indictment for forgery. *Queen v. Kinnear*, 2 Moody & R. 117. In *Miller v. Thomson*, 3 Man. & G. 576, such an instrument was declared on as a promissory note; but in that case the bill was drawn upon a joint-stock bank by the manager of one of its branch banks.

(d) *Queen v. Kinnear*, 2 Moody & R. 117.

(e) *Maule*, J., *Miller v. Thomson*, 3 Man. & G. 576, 579. *Sed quære*.

(f) *Cunningham v. Wardwell*, 3 Fairf. 466; *Roach v. Ostler*, 1 Man. & R. 120. See *Hasey v. White Pigeon B. S. Co.*, 1 Doug. Mich. 193.

(g) See *Dougal v. Cowles*, 5 Day, 511; *Marion, &c. R. Co. v. Hodge*, 9 Ind. 163.

(h) *Dougal v. Cowles*, 5 Day, 511. See *Miller v. Thomson*, 3 Man. & G. 576.

(i) *Hasey v. White Pigeon B. S. Co.*, 1 Doug. Mich. 193; *Miller v. Thomson*, 3 Man. & G. 576. Such an instrument is a clear acknowledgment of an indebtedness, and may be the foundation of an action. *Marion, &c. R. Co. v. Hodge*, 9 Ind. 163. It must be presented in a reasonable time for payment. *Marion, &c. R. Co. v. Dillon*, 7 id. 404. *Contra*, *Fairchild v. O. C. & R. R. Co.*, 15 N. Y. 337. The declaration in an action against the corporation must allege that the orders had been presented for payment. *Marion, &c. R. Co. v. Lomax*, 7 Ind. 648; *Marion, &c. R. Co. v. Dillon*, id. 404.

liable as an acceptor.(j) If there is no date to an acceptance, the presumption of law is that it was accepted before due, and whoever asserts that the acceptance was after maturity must prove it. This presumption would rest on the course of business, as making this usual and actually probable, and also on the principle that the instrument becomes thereby more perfectly what it purports to be, a regularly negotiated bill of exchange.

But although every acceptance is presumed to have been made within a reasonable time after the date of the bill, and before it falls due,(k) yet it is not invalid because made after maturity. The acceptor, in such case, is liable to pay on demand, and if the declaration states the acceptance to be "according to the tenor and effect" of the bill, these words are considered surplusage.(l) Acceptance may also be made after a previous refusal to accept;(m) but it has been held that, if the holder of a bill payable a certain number of days after sight elects to consider what passes on presentment as a refusal to accept, and protests the bill, he is bound by such election as to the other parties to the bill; and if he neglects to give them notice of dishonor, they are discharged, although the drawee retracts his refusal the next day, and accepts.(n) An accept-

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(j) *Gray v. Milner*, 3 J. B. Moore, 90; *Regina v. Hawkes*, 2 Moody, C. C. 60; *Wheeler v. Webster*, 1 E. D. Smith, 1. There hardly seems to be sufficient reason for the remark of *Patteson, J.*, *Davis v. Clarke*, 6 Q. B. 16, that this decision "goes to the extremity of what is convenient." Considerable doubt has also been thrown upon this point by the case of *Peto v. Reynolds*, 9 Exch. 410. But the objections are hardly satisfactory. It is said in *Gray v. Milner*, *supra*, that the bill being addressed to the inhabitant of a particular house, the defendant's acceptance was conclusive evidence that he lived in that house, and consequently the drawer was induced to look no further. But why may not the acceptance be as well conclusive evidence that the acceptor was the party intended to be drawn upon, and thereby the drawer was induced to look no further? The objection, that, if such an instrument was presented to two or more acceptors, each of whom promises to pay, there would be some doubt as to which was the acceptor, is likewise unsatisfactory. It would be clearly the first, and the names of subsequent acceptors would be mere surplusage, as in the bill where a drawee was named. With regard to the case of *Regina v. Hawkes* not being entitled to the same weight of authority as a decision pronounced in the presence of the public, it might be suggested that certainty is much more requisite in an indictment for forgery than in a declaration in a civil suit.

(k) *Roberts v. Bethell*, 12 C. B. 778.

(l) *Jackson v. Pigott*, 1 Ld. Raym. 364; *Mutford v. Walcot*, id. 574; *Stein v. Yglesias*, 1 Crompt. M. & R. 565; *Billing v. Devaux*, 3 Man. & G. 565; *Christie v. Pearl*, 7 M. & W. 491.

(m) *Wynne v. Raikes*, 5 East, 514.

(n) *Mitchell v. Degrand*, 1 Mason, 76.

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ance may be made prior to drawing the bill, by writing the name of the acceptor across the face of the paper ; and if the acceptor delivers it as an acceptance, he is estopped from saying that he delivered it before the bill was drawn, nor need the holder prove any custom of merchants thus prematurely to accept an intended bill, nor will there be a variance if the declaration states the drawing of the bill in the usual form, and that the drawee afterwards accepted. We think, however, the paper should be filled up and used within a reasonable time after it was signed.(o) The acceptor of such a paper may be made liable for any amount which the person receiving the paper chooses to insert in the bill ; nor is it necessary that the bill be drawn by the same person to whom the blank acceptance is handed.(p)

A factor who receives and holds goods against which a bill of exchange is drawn, acquires a lien on the consignment for the amount of the bill, even though the goods are not in his possession, but are still in the hands of a forwarder.(q) It is however well settled, that a bill of exchange drawn against a consignment of goods does not generally operate as a specific appropriation of the goods or their proceeds to the payment of the bill, either at law or in equity.(r) And if a person has goods or funds in the possession of another, he cannot by drawing a bill on that person render

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(o) *Molloy v. Delves*, 4 Car. & P. 492, 5 Moore & P. 275 ; *Bank of Limestone v. Penick*, 5 T. B. Mon. 25. In *Montague v. Perkins*, C. B. 1853, 22 Eng. L. & Eq. 516, it was held that it is no defence that an acceptance was given in blank to the drawer, and that the bill was not issued until twelve years after ; the statute of limitations commencing to run from the time the bill was due as filled up, and not from the time it would have become due if completed when accepted in blank. In *Temple v. Pullen*, 8 Exch. 389, it was held proper to leave the question to the jury to say whether a note which was not filled up till six years after the signature in blank, was filled up within a reasonable time, considering the circumstances of the defendant and his ability to pay the note. The same doctrine seems to have been decided with regard to a blank acceptance, in *Mulhall v. Neville*, 8 Exch. 391, note. The authority given by a blank acceptance to fill it up is not lost merely because the drawer by mistake antedates the instrument a year, although it is made payable a certain time after date ; and if the period has elapsed from the time of the completion of the instrument, an action may be maintained upon it, and the variance will be amendable. *Armfield v. Allport*, 3 H. & N. 911.

(p) *Schultz v. Astley*, 2 Bing. N. C. 544, 7 Car. & P. 99.

(q) *Davis v. Bradley*, 28 Vt. 118 ; *Gragg v. Brown*, 44 Maine, 157 ; 1 *Parsons on Contracts*, 84, note q.

(r) *Harris v. Clark*, 3 Comst. 93, 118 ; *Cowperthwaite v. Sheffield*, 1 Sandf. 416, 3 Comst. 243 ; *Winter v. Drury*, 1 Seld. 525 ; *Marine & Fire Ins. Bank v. Jauncey*, 3 Sandf. 257 ; *Chapman v. White*, 2 Seld. 412 ; *Wheeler v. Stone*, 4 Gill. 38.

the drawee liable to the payee for not accepting the draft.<sup>(s)</sup> But it would seem that, if a person should write to a factor that he had sent him certain goods for sale, and drawn a bill on him on the credit of the goods to a certain amount, the factor, if he received the consignment, would be bound to accept the bill.

The question still remains whether the payee of the bill would have a right of action against the factor as an acceptor for money had and received to his use, on the ground that the acceptance of the consignment was equivalent to a promise to accept. We should hold him so liable, on the ground that by accepting the consignment he had made a contract with the drawer to accept the bill, and that this contract being for the benefit of a third person, this person might bring an action for the breach of the contract.<sup>(t)</sup>

As a note, although made, only takes effect when it is delivered, the same thing is true of an acceptance. This therefore is revocable until the bill is delivered to the holder or his agent who presents it for acceptance,<sup>(u)</sup> although it seems to have been held otherwise formerly.<sup>(v)</sup> If the acceptance is in any of the ways which we have seen to be equivalent to the usual acceptance, and the bill is not in the hands of the acceptor, then, of course, delivery by him cannot be necessary, for it is not practicable, and it would seem, therefore, that such an acceptance must be irrevocable. Certainly it would be so after any holder had received the assurance of it, and was justified in regarding the bill as an accepted one, and as his property.<sup>(w)</sup> The acceptance of a bill payable so many days after sight takes effect from its date, and not from the time of presentment, nor does the doctrine of relation apply in such cases; and in the computation of the time the day of the date is excluded.<sup>(x)</sup>

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<sup>(s)</sup> *Grant v. Ansten*, 3 Price, 58; *New York & Virginia State Bank v. Gibson*, 5 Duer, 574. See, *contra*, *Corser v. Craig*, 1 Wash. C. C. 424.

<sup>(t)</sup> We are not aware that this precise question has been decided, but it would seem to follow from the principles stated in the text. See *Carnegie v. Morrison*, 2 Met. 381.

<sup>(u)</sup> *Cox v. Troy*, 5 B. & Ald. 474.

<sup>(v)</sup> *Thornton v. Dick*, 4 Esp. 270; *Tummer v. Oddie*, cited 6 East, 200. See *Ben-tinck v. Dorrien*, id. 199; *Raper v. Birkbeck*, 15 id. 17.

<sup>(w)</sup> *Grant v. Hunt*, 1 C. B. 44.

<sup>(x)</sup> *Mitchell v. Degrand*, 1 Mason, 176.

## SECTION II.

## PROMISE TO ACCEPT.

THE question has frequently arisen, under what circumstances a promise to accept is equivalent to an acceptance. The general principles which determine the answer to this question are these. On the one hand, it must frequently happen in mercantile business that persons who are arranging for a future transaction, and seeking to ascertain what security or what resources they may have, inquire whether certain bills which enter into the arrangement are to be accepted, and, learning that they are to be so, rely upon them in a way which would make disappointment disastrous. But, on the other hand, they must, at their own peril, discriminate between answers or statements which merely give information, and those which constitute or imply a definite promise. For it is only upon this last class of statements that the law authorizes them to rely, on the ground that a refusal of the law to recognize and enforce such promises would be very embarrassing to mercantile business. Between these two classes of cases it may sometimes be difficult to discriminate, and this difficulty may sometimes appear to give to the law an uncertainty which belongs to the fact.

The law of England on this subject seems to differ somewhat from the law of America. In the former country it was for some time uncertain whether a parol promise to accept a non-existing bill was valid as an acceptance under any circumstances; but the later authority is that it is not so valid.<sup>(y)</sup> Nor would a

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(y) The case of *Pillans v. Van Mierop*, 3 Burr. 1663, has been cited as authority for the doctrine that a parol promise to accept a bill to be drawn was a valid acceptance, yet it is doubtful whether it sustains it. It is authority to show that there may be an acceptance before the bill is drawn, and it is not clear what else it actually decides. In *Pierson v. Dunlop*, Cowp. 571, the qualification is added, that a written promise must be accompanied by circumstances which might induce a third party to take the bill. *Mason v. Hunt*, 1 Doug. 296, and *Miln v. Prest*, 4 Camp. 393, adopt similar views. In *Johnson v. Collings*, 1 East, 98, the point actually decided was, that a parol promise, where no third party was induced thereby to take the bill, was not binding as an acceptance. The language used by Lord *Kenyon* in his decision is, however, general; "that a promise to accept a bill before it is drawn is not equally binding as if made afterwards." The decision in the *Bank of Ireland v. Archer*, 11 M. & W. 383, is, that a parol promise to accept is not an acceptance, even where the holder discounted



written promise to accept such a bill now be held equivalent to acceptance in any case, the terms of the statute 1 and 2 Geo. IV. c. 78, of course precluding all question as to inland bills.(z) A parol promise to accept an existing foreign bill is still considered equivalent to an acceptance,(a) and the same must be true of a written promise, which will enure to the benefit of the holder, even if made after the maturity of the bill, and though he was not induced thereby to take it.(b) The promise may be given to the drawer, or to any other party to the bill after it has been indorsed away, or to a person by whose direction and on whose account the bill was drawn, though not a party to it.(c) And it seems to be regarded as so entirely the equivalent of a regular acceptance, that the drawer cannot revoke it, even with the consent of the promisee, though no party to the bill had notice of the acceptance.(d)

In America there appears to be a conflict of authority as to whether a parol promise to accept a bill to be drawn is equivalent to acceptance. On principle, we should say that it ought not to be so considered;(e) but, adopting the language of Marshall, C. J., in the case in which the Supreme Court of the United States unanimously determined the limitations to the rule, we should state it to be the rule of American law, that a written promise to accept a non-existing bill, made within a reasonable time before the date of the bill, describing it in terms not to be

the bill on the faith of such promise. The language of Baron Parke is likewise general, and it seems to be admitted that the decision would have been the same had the promise been written. See the opinion of eminent English counsel in *Russell v. Wiggins*, 2 Story, 213

(z) "No acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts"

(a) *Mendizabal v. Machado*, 6 Car. & P. 213, affirmed 3 Moore & S. 841; *Pierson v. Dunlop*, 2 Cowp. 571; *Miln v. Prest*, 4 Camp. 393.

(b) *Wynne v. Raikes*, 5 East, 514; *Clarke v. Cock*, 4 id. 57; *Powell v. Monnier*, 1 Atk. 611.

(c) *Grant v. Hunt*, 1 C. B. 44; *Fairlee v. Herring*, 3 Bing. 625, 11 J. B. Moore, 520.

(d) *Grant v. Hunt*, 1 C. B. 44.

(e) *Kennedy v. Geddes*, 8 Port. Ala. 263 In *Williams v. Winans*, 2 Green, N. J. 339, a parol promise to accept a bill to be drawn was held valid, and in *Bank of Michigan v. Ely*, 17 Wend. 508, 510, *Nelson*, C. J. said, that it was well settled that "a parol promise to accept a future bill was not binding, unless the bill was taken by the holder upon the faith and credit of such promise," referring to *Ontario Bank v. Worthington*, 12 Wend. 593.

mistaken, is, if shown to one who takes it on the faith of such writing, a virtual acceptance.(f) It seems also that the bill should be payable on demand, or at a fixed time after date, and not after sight, so that there may be a certain time from which the days are to be counted.(g)

(f) So held in *Coolidge v. Payson*, 2 Wheat. 66, 2 Gallis. 233. See also *Schimmelpennich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 id. 111; *Wildes v. Savage*, 1 Story. 22; *Russell v. Wiggin*, 2 id. 213; *Bayard v. Lathy*, 2 McLean, 462; *Storer v. Logan*, 9 Mass. 55; *Carnegie v. Morrison*, 2 Met. 381; *Kennedy v. Geddes*, 8 Port. Ala. 263, 3 Ala. 581; *Carrollton Bank v. Tayleur*, 16 La. 490; *Vance v. Ward*, 2 Dana, 95; *Parker v. Greele*, 2 Wend. 545, 5 id. 414. In *Boyce v. Edwards*, 4 Pet. 111, a letter written two years before the bill was drawn, and not referring to that particular bill, was held no acceptance. In *Wilson v. Clements*, 3 Mass. 1, two years intervened between the promise and drawing the bill, and it was held no acceptance on that account. The bill must be taken on the credit of the promise. *M'Evers v. Mason*, 10 Johns. 207; *Ontario Bank v. Worthington*, 12 Wend. 593. In *Read v. Marsh*, 5 B. Mon. 8, the language is somewhat ambiguous, but it is conceived that the court did not intend to lay down the rule, that a promise to accept a *future* bill, not taken on the credit of the promise, operated as an acceptance. In *Goodrich v. Gordon*, 15 Johns. 6, a letter containing the following instructions from the owner of a vessel to the master, — "You will endeavor to ransom the vessel as low as possible, not to exceed \$ 2,000, your draft on me will be honored," — was held tantamount to the acceptance of a bill subsequently drawn for that amount. In *Parker v. Greele*, 2 Wend. 545, the terms of the letter were, "I have no objection to accepting for you at three and four months." This was held to authorize a draft for the whole sum at four months, and the holder was allowed to recover without showing what the terms proposed were, or that they were complied with. This case was affirmed in 5 Wend. 414, by a vote of 14 to 8. There was a disagreement as to the burden of proof with regard to showing what the terms were, and a compliance with them. Also some of the Senators held that there should have been two bills drawn, one at three and the other at four months, each for half the whole amount. It was also thought that the promise did not come within the rule, that the bill should be drawn in terms not to be mistaken. In *Bank of Michigan v. Ely*, 17 Wend. 508, the words of the letter were: "You can make drafts on me due in August next, to the amount of \$ 10,000. Make them in sums of \$ 1,000 each, and spread the time of their payment through the month." Only five bills were drawn. The holder took drafts on the faith of the letter, and sued the defendant as acceptor. The letter was treated as an acceptance. In *Ulster Co. Bank v. McFarlan*, 5 Hill, 432, the letter contained the following: "I hereby authorize you to draw on me at ninety days, from time to time, for such amounts as you may require, provided that the whole amount running and unpaid shall not exceed \$ 3,000." This was held to be a sufficient promise, although it will be seen that the bills were not specified, either as to number, amount, or date. In a subsequent suit between the same parties, 3 Denio, 553, it appears to have been conceded by the counsel that there was an acceptance, but Senator Hand in a *dictum* denied this, stating that "the promise must point to the particular bills, and describe them in terms not to be mistaken." Senators Spencer and Talcott affirmed its correctness.

(g) *Wildes v. Savage*, 1 Story, 22. In this case *Story, J.* said: "It does not appear to me that the doctrine ever was applicable, or could be applied, to any bills of exchange, except such as were payable on demand, or at a fixed time after date.

Expressions of decided regret that this "doctrine of virtual acceptance" was ever established, have frequently been used.<sup>(h)</sup> But the rule above stated seems now to be part of the commercial law of the country; and in the notes we have endeavored to illustrate by the cases the way in which the rule has been applied, and the modifications which it has undergone.

The rules of law on this subject have been frequently applied

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Where bills are drawn payable at so many days after sight, it is impracticable to apply the doctrine, for there remains a future act to be done, — the presentment and sight of the bill before the period for which it is to run, and at which it is to become payable, can commence, whether it be accepted or dishonored. How can the time be calculated upon such a bill before it is presented? If a letter is written promising to accept a non-existing bill to be thereafter drawn at six months' sight, when is the acceptance to be deemed made? At the time of the bill? Certainly not, for that would be at war with the obvious intent of the parties, which plainly is that the acceptance shall be on a future sight of the bill. If it is said that the acceptance is to be treated as made when the bill is actually presented for acceptance, and it is dishonored by the drawee, it is as plain that we set up a prior intent or promise against the fact. Upon what ground can a court say, where a party promises to do an act in future, such for example as to accept a bill when it shall be drawn and presented to him at a future time, that his promise overcomes his act at that time, — that his refusal to perform his promise amounts to a performance of it? It is quite another question whether the holder who has taken such a bill upon the faith of such promise may not have some other remedy, either at law or in equity, for this breach of it, against the promisor. My judgment is, that the doctrine of a virtual acceptance of a non-existing bill, by a prior promise to accept it, when drawn, has no application to a bill drawn payable at some fixed period after sight, for it amounts to no more than a promise to do a future act; I have looked into the authorities, and I do not find in any one of them that the bill drawn, and to which the doctrine was applied, was a bill drawn payable at or after sight."

(h) Lord *Kenyon*, *Johnson v. Collings*, 1 East, 98: "It is much to be lamented that anything has been deemed to be an acceptance of a bill of exchange besides an express acceptance in writing; but I admit that the cases have gone beyond that line, and have determined that there may be a parol acceptance; that perhaps was going too far, and I am not disposed to carry them to the length now contended for, and to say that a promise to accept a bill before it is drawn is equally binding as if made afterwards." "Admitting a promise to accept before the existence of the bill to operate as an actual acceptance of it afterwards, was carrying the doctrine of implied acceptances to the utmost verge of the law." *Story, J.*, *Wildes v. Savage*, 1 Story, 22: "It is perhaps to be lamented that the doctrine of such virtual acceptances ever was established, and if the question had been entirely new, I am well satisfied that it would not have been recognized as fit to be promulgated by the Supreme Court, it being at once unsound in policy and full of inconvenience. But that court yielded, as did the judge who decided the case in the Circuit Court, *Coolidge v. Payson*, 2 Wheat. 66, to what seemed at that time the true result of the English authorities upon an important practical commercial question. I am not sorry to find that professional opinion has settled down in England against the doctrine, although there is no pretence to say that up to this very hour there has been any formal decision in Westminster Hall against it."

to the acceptance of bills of exchange by a previous letter of credit authorizing them to be drawn. Where the bills are specifically described in the letter, drawn within a reasonable time from the date, and taken on the credit thereof, they would come under the terms of the rule which we have already stated; but some authorities have gone still further, and held that such a letter would be regarded as an acceptance of all bills drawn by virtue of it, and coming within its terms, though not described by dates, numbers, or amounts.<sup>(i)</sup> As upon a point of this kind uniformity is specially desirable, a general adoption might be wished of the limitations upon anticipated acceptance by promise which have been adopted by the Supreme Court of the United States. We should greatly prefer saying that the drawer of such a bill might have his action against the writer of the letter for his refusal to accept, and also that the holder of the bill, having the letter in his possession, with evidence that he had bought or received the bill on the credit of the letter, which evidence may be by indorsement on the letter or otherwise, should be considered as having sufficient privity to sustain the action in his own name.<sup>(j)</sup>

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(i) See *Parker v. Greele*, 2 Wend. 545, 5 Wend. 414; *Bank of Michigan v. Ely*, 17 Wend. 508; *Ulster Co. Bank v. McFarlan*, 5 Hill, 432, 3 Denio, 553. The facts in these cases are stated *supra*, p. 294, note *f*. *Banorgee v. Hovey*, 5 Mass. 11, is sometimes cited as authority for this doctrine, but without foundation, as is conceived. In *Storer v. Logan*, 9 id. 55, the bills declared on were both specified as to dates and amount in the letter. In *Carnegie v. Morrison*, 2 Met. 381, an action on a letter of credit specifying no bills, the court said that there was "no serious ground to contend that the undertaking of the defendants was such an agreement to accept a particular specified bill as to bring it within the authority of the American cases."

(j) The opinions of Sir W. Follett, Sir John Bayley, Sir F. Pollock, and M. D. Hill, in 1 Story, 26, are to the effect that, in England, no action whatever can be maintained on a letter of credit, by a holder of a bill taken on the faith of the letter, because there is no privity of contract between the parties. If upon such high authority this may be regarded as the law in England, we still think that this is not the law in America. In *Carnegie v. Morrison*, 2 Met. 381, the question was elaborately discussed by Shaw, C. J., who said (p. 396): "The objection to such an action and the ground of this defence are, that the immediate parties to the transaction were Bradford on the one side, and the defendants on the other; that to this transaction the plaintiffs were strangers; and that, as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him, and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them, and others who may subsequently assent to, and become interested in, its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a

The question has arisen as to how far a written authority given by the drawer to a party to draw bills upon him can be considered as an acceptance. The same principle should apply here, we apprehend, as in the case of letters of credit. Where the in-

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common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that, if he does accept and pay the bill, he, the drawer, will allow the amount in account, if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee, that he will pay him the amount, if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A deposits money with B to the use of C, the latter may have an action against B, though they are in fact strangers. But if C, not choosing to look to B as his debtor, calls upon A to pay him, notwithstanding such deposit, (as he may,) and A pays him, A shall have an action against B to recover back the money deposited, if not repaid on notice and demand. The law operating upon the act of the parties creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. *Hall v. Marston*, 17 Mass. 575. So in regard to a very common transaction; when one deposits money in a bank to the credit of a third person, and forwards him a certificate, or other evidence of the fact, the bank is regarded as coming under an obligation to pay the money to the person to whose credit it is thus deposited. So it is held in England, when the depositary assents to receive the money, though there is no consideration moving from the plaintiff to the defendant. *Lilly v. Hays*, 5 A. & E. 548. . . . (P. 402 :) It seems to have been regarded as a settled point, ever since reports have been published in this State, rather than as an open question to be discussed and considered. The position is, that where one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." The learned judge then referred to *Felton v. Dickinson*, 10 Mass. 287; *Arnold v. Lyman*, 17 id. 400; *Dutton v. Poole*, 1 Vent. 318; and resumed (p. 403): "The court are of opinion that the promise of the defendants, made by the letter of credit, in the present case, comes within the principle of the cases cited. Bradford was indebted to the plaintiffs, and was desirous of paying them; and he must resort to some mode of remittance. He had funds either in cash or credit with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking, he forbore to adopt other measures to pay the plaintiffs' debt. He gave the plaintiffs notice of what he had done, and sent them the instrument as authentic evidence of the fact. They assented to and affirmed it, as an act done in their behalf, and gave the defendants notice thereof, and, conformably to the terms of the letter of credit, drew their bills on the defendants. The refusal to accept was a breach of the promise thus made, and, in the event that happened, the insolvency of Bradford, the plaintiffs lost their debt. It would be in vain to say that this promise was not made for the benefit, or, according to the terms of some of the cases, for the *interest* of the plaintiffs. The result shows that, by a compliance with the plain, literal terms of their promise, on the part of the defendants, the plaintiffs would have received their debt. By a refusal to perform that promise, they have lost it. They are therefore damnified to the full amount of the sum for which the credit was given." *Murdock v. Mills*, 11 Met. 5; *Barney v. Newcomb*, 9 Cush. 46. This doctrine is fully approved by *Story, J.*, *Russell v. Wiggin*, 2 Story, 213; *Wildes v. Savage*, 1 id. 22; *Baring v. Lyman*, id. 396; *Wallace v. Agry*, 4 Ma-

strument intelligibly describes the bills to be drawn, and an unreasonable time has not elapsed between its date and that of the bills, and they are taken on the credit of the writing, we should hold that this was a virtual acceptance of bills drawn in conformity with its terms. And if the bills are not described with sufficient particularity to constitute acceptance, our opinion is that an action may be maintained for breach of the promise to accept, as in the case of letters of credit just mentioned. Some cases lay down the broad rule, that an authority given by A to B to draw bills on him is virtually an acceptance of any bills drawn within such authority; but we believe that in most of them the language is more comprehensive than the cases themselves warrant, or else that the distinction between an action on the bill as an accepted bill, and one on the failure to perform the promise, is not sufficiently attended to.<sup>(k)</sup> In this country a parol or written promise to accept an existing bill is treated as acceptance, unless it be made insufficient by statutory provision.<sup>(l)</sup>

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son, 336; *Boyce v. Edwards*, 4 Pet. 111, in which the distinction between an action on a bill as an accepted bill, and one founded on the breach of a promise to accept, is fully pointed out; *Townsley v. Sumrall*, 2 id. 170. See the cases cited *supra*, p. 294, note *f*; also *Adams v. Jones*, 12 Pet. 207; *Edmonston v. Drake*, 5 id. 624; *Lawrason v. Mason*, 3 Cranch, 492. *Carrollton Bank v. Tayleur*, 16 La 490, seems to hold that an action can be maintained by the holder, unless the letter is addressed to him. In *Birckhead v. Brown*, 5 Hill, 634, it was held that, if the letter is special, that is, addressed to a particular individual, he alone has the right to sue for breach of promise to accept, and that a third party, who has advanced money on the credit of it, cannot, for want of privity of contract. This case was affirmed by a vote of 11 to 11, in 2 Denio, 375.

(*k*) See *Van Reimsdyk v. Kane*, 1 Gallis. 630; *Banorgie v. Hovey*, 5 Mass. 23; *Mayhew v. Prince*, 11 id. 55; *Wallace v. Agry*, 4 Mason, 336; *Lewis v. Kramer*, 3 Md. 265; *Beach v. State Bank*, 2 Ind. 488. The cases of *Ulster Co. Bank v. McFarlan*, 5 Hill, 432, 3 Denio, 553, and *Bank of Michigan v. Ely*, 17 Wend. 508, cited *supra*, p. 294, note *f*, are authority for the doctrine that a written authority is a virtual acceptance. In *Ulster Co. Bank v. McFarlan*, it was decided that an authority to draw at ninety days was an authority to draw at ninety days after sight, and not after date. But in *Barney v. Newcomb*, 9 Cush. 46, it was held that one authorized to draw on another "at ten or twelve days," may exercise his own discretion whether to draw after sight, or after date; and the correctness of the decision in *Ulster Co. Bank v. McFarlan* is denied. The court say: "The opinion of the Supreme Court (of New York) was placed upon the ground that the drawee, by authorizing a draft at ninety days, intended to secure himself a credit of ninety days after notice that the bill was drawn; but if drawn ninety days after date, he might not have any time, as the holder might not present the bill till it came to maturity. The answer to that is, if he meant so, he should have said so; and as he did not say so, there is nothing to show that he meant so, as it is as usual to draw after date as after sight."

(*l*) *Edson v. Fuller*, 2 Foster, 183; *Grant v. Shaw*, 16 Mass. 341; *Ward v. Allen*, 2 Met. 53.



Among the more specific application of the principles which regulate acceptance by previous authority, the following may be mentioned. Authority to an agent to arrange an unsettled affair and draw on his principal for necessary sums, is a virtual acceptance of a draft made with the knowledge and assent of such agent; but the drawer cannot substitute a new draft in favor of another payee, without the consent of the drawee or his agent.*(m)*

If authority is given by two or more persons to draw on them, or either of them, and they promise jointly and severally to hold themselves accountable for the acceptance and payment of such drafts, the signers are jointly and severally bound to the payment of acceptances made by one of them.*(n)* Authority from the directors of a corporation to the treasurer to accept drafts, must be strictly proved, but when proved, a valid consideration and a proper purpose for acceptance may be presumed.*(o)*

In a case where a firm in England sent out an agent to America, with authority to draw bills on the firm, sell, and discount them, which he did, but the firm became bankrupt before the bills arrived in England, it was held that no proof could be made by an indorsee of a bill, as the authority to the agent did not amount to an implied acceptance.*(p)* If the authority be upon terms or conditions, compliance with them is necessary to enable the holder to recover of the party authorizing the draft to be drawn.*(q)*

If the draft or bill already exists, a parol promise to accept it must be on a distinct consideration, or it bears no force, either as an acceptance or as a promise to accept; if it rests on a consideration, it is a good acceptance.*(r)* If on presentation of the bill the drawee refuses to accept, but promises the holder to pay the sum for which it was drawn on the day on which it is payable, this is not an acceptance, even if the drawee have funds of the drawer in his hands, and ought in justice to have accepted the bill.*(s)* If, however, the bill were drawn on a specific fund, so

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*(m)* *Gates v. Parker*, 43 Maine, 544.

*(n)* *Michigan State Bank v. Peck*, 28 Vt. 200.

*(o)* *Partridge v. Badger*, 25 Barb. 146.

*(p)* *Ex parte Bolton*, 3 Mont. & A. 367.

*(q)* *Murdock v. Mills*, 11 Met. 5; *Ulster Co. Bank v. McFarlan*, 5 Hill, 432, 3 Denio, 553.

*(r)* *Strohecker v. Cohen*, 1 Speers, 349.

*(s)* *Luff v. Pope*, 5 Hill, 413, 7 id. 577. The holder of a bill payable at sight presented it, but the drawee refused, saying that he had no funds, but afterwards said he



as not to amount to a negotiable bill of exchange, the draft and promise might then not only hold the drawee, but work an equitable assignment of the fund.<sup>(t)</sup> In some places there is a custom for banks to certify checks drawn upon them as good. This has been treated as a promise to pay such checks on presentment, and equivalent to acceptance, rendering the bank liable as acceptor, as in the case of bills of exchange.<sup>(u)</sup>

### SECTION III.

#### CONDITIONAL AND QUALIFIED ACCEPTANCES.

IN the chapter upon the essentials of a promissory note, and the section on the certainty of the fact of payment, we have seen that if the promise to pay be upon condition, or be dependent on a contingency, the instrument is not a negotiable promissory note. And it has also been said repeatedly, that an acceptor of a bill stands in the same relation to it as the promisor of a note. Here, however, is an important difference. Not only may a drawee, as we have seen, be held as acceptor on a promise to accept, but if he actually accepts on a condition or a contingency, this acceptance *may* be valid and sufficient.

The law on this subject is, however, somewhat difficult, and in some respects not altogether certain.

In the first place, we would remark, that the subject of conditional acceptance is closely connected with that of a promise to accept, a conditional acceptance being no more in fact than a promise to accept upon the happening of some future event or circumstance. Whether the facts proved in any case amount to

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would answer it at the commencement of the next quarter. The holder did not agree to wait, remarking that he would send it back to the drawer. The bill, however, was not sent back, but presented again by the same holder some time after the time mentioned. *Held*, that these facts did not amount to an acceptance or a contract; and that evidence that the drawee had funds at the time of refusal was irrelevant. *Peck v. Cochran*, 7 Pick. 34. The drawee of an order for a seaman's share of the proceeds of a whaling voyage declined to accept, but took the order, promising to try and save the amount for the payee, if the drawer consented. The drawer, on his return, refused to assent. *Held*, no acceptance or assignment. *Parkhurst v. Dickerson*, 21 Pick. 307.

(t) So said in *Luff v. Pope*, 5 Hill, 413; *Harrison v. Williamson*, 2 Edw. 430. See, for an illustration of this principle, *Berly v. Taylor*, 5 Hill, 577.

(u) See *post*, Chapter on Checks.

an absolute or to a conditional acceptance, is a question of law for the court to determine. *(v)* It has been held that an acceptance, absolute on its face, cannot be shown to be conditional, by parol, between the immediate parties thereto, as this would be to contradict the terms of the written contract; *(w)* but if the acceptance is ambiguous, it may be explained by parol. *(x)* An absolute acceptance may be qualified by an express condition in a separate and simultaneous writing, because both instruments are regarded as forming but one contract; but this cannot affect a third party, who took the bill without knowledge of the condition. *(y)* A conditional acceptance becomes at once absolute on the performance of the condition, but it should still be set forth in the declaration as conditional, with an averment of performance, *(z)* the burden of proof being upon the plaintiff to show such performance. *(a)*

The following are some of the instances in which an acceptance has been held conditional. A promise to pay when certain goods consigned to the drawee are sold; *(b)* when in cash for the cargo of Ship Thetis; *(c)* to accept when a navy bill is paid; *(d)* to pay as remitted from thence at usance; *(e)* that the bill shall

*(v)* *Sproat v. Matthews*, 1 T. R. 182, *Willes*, J. dissenting. *Buller*, J. said: "Whatever may have been the doubts formerly of what amounted to acceptance, I conceive it is the sole province of the court to decide whether this is an absolute or a conditional acceptance." *Edson v. Fuller*, 2 Foster, 183; *Barnet v. Smith*, 10 id. 256.

*(w)* *Heaverin v. Donnell*, 7 Smedes & M. 244. *Adams v. Wordley*, 1 M. & W. 374, was an action by the drawer against the acceptor. The plea averred an agreement, not stated to be in writing, which set forth that the plaintiff agreed not to call upon the defendant till an action against a third party was determined. The plaintiff demurred, and the demurrer was sustained. *Parke*, B. said: "At present it is enough to say that you seek, by a parol contemporaneous agreement, to alter the absolute engagement entered into by the bill." By Lord *Abinger*, C. B.: "It would be very dangerous to allow a party to alter in such a manner the absolute contract on the face of a bill of exchange." In *Hoare v. Graham*, 3 Camp. 57, Lord *Ellenborough* said: "This would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles."

*(x)* *Swan v. Cox*, 1 Marsh. 176.

*(y)* *Bowerbank v. Monteiro*, 4 Taunt. 844; *Mason v. Hunt*, 1 Doug. 297.

*(z)* *Langston v. Corney*, 4 Camp. 176; *Ralli v. Sarell*, 1 Dow. & R. N. P. 33; *Swan v. Cox*, 1 Marsh. 176.

*(a)* *Read v. Wilkinson*, 2 Wash. C. C. 514; *Gammon v. Schmoll*, 5 Taunt. 344.

*(b)* *Smith v. Abbot*, 2 Stra. 1152.

*(c)* *Julian v. Shobrooke*, 2 Wils. 9.

*(d)* *Pierson v. Dunlop*, 2 Cowp. 571.

*(e)* *Banbury v. Lissett*, 2 Stra. 1211.

be paid when funds arrive from France ; (*f*) to renew an acceptance till sufficient effects are received from the estate of A ; (*g*) to pay if a certain house should be given up to the drawee before a day named ; (*h*) a statement that the bill will not be accepted until the ship with the wheat arrives ; (*i*) that the drawee cannot accept till stores are paid for ; (*j*) that the drawee did not know whether the ship on whose cargo the bill was drawn would come to London, and therefore he could not accept, with a subsequent statement that the bill would be paid, even if the ship was lost ; (*k*) an agreement to accept on consideration that goods shall be consigned to the acceptor to answer the bill, together with a policy of insurance upon them ; (*l*) a promise by the drawee to the holder, that, if he would get back the bill after it had been protested and returned, it should be paid ; (*m*) to pay if the consignment was sold when the bill became due ; (*n*) an acceptance according to a certain contract. (*o*)

Acceptance is sometimes made "when in funds." Of course the acceptor is then liable only when he has funds. In one case it was held that this meant when the drawee has funds which the drawer has a present right to demand and receive, and did

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(*f*) *Mendizabal v. Machado*, 6 Car. & P. 218, 3 Moore & S. 841.

(*g*) *Bowerbank v. Monteiro*, 4 Taunt. 844.

(*h*) *Swan v. Cox*, 1 Marsh. 176.

(*i*) *Miln v. Prest*, 4 Camp. 393.

(*j*) *Pierson v. Dunlop*, 2 Cowp. 571.

(*k*) *Sproat v. Matthews*, 1 T. R. 182. In this case the court held that this was a conditional acceptance, depending upon either one of the two events mentioned, as it was evident from what passed, that there was no intent to accept unless the acceptor should have funds in his hands with which to reimburse himself; that, if the ship came to London, he would have the disposal of the cargo; if she was lost, he had in his possession a policy of insurance, a lien which would provide him with sufficient funds.

(*l*) *Mason v. Hunt*, 1 Doug. 297.

(*m*) *Grant v. Shaw*, 16 Mass. 341. In *Anderson v. Hick*, 3 Camp. 179, a bill drawn on the defendants was returned unaccepted; but one of the defendants afterwards said to the plaintiff: "If you will send the bill to the counting-house again, I will give directions for its being accepted." No proof was offered that the bill was again sent to the defendants' counting-house, it being contended that the fact amounted to an absolute acceptance; but Lord *Ellenborough* said: "This was only a conditional promise to accept, and could not operate as an acceptance till the bill was sent back to the counting-house." The plaintiff was accordingly nonsuited. So also *Cox v. Coleman*, Cas. Temp. Hardw., London ed., 75.

(*n*) *Browne v. Coit*, 1 McCord, 408.

(*o*) *Kellogg v. Lawrence*, Hill & D. 332.

not apply to wages for daily labor earned after acceptance, and needed for the daily subsistence of the laborer.(p)

The acceptance of an order payable "if in funds," is regarded as an admission by the acceptor that he has funds, and he cannot

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(p) *Wintermute v. Post*, 4 N. J. 420. *Haines, J.* said: "The term 'when in funds' literally means when the acceptor is in the possession of cash which the drawer has a present right to demand and receive, or to appropriate by his bill, whether such funds be the product of labor, or of commodities furnished, of goods sold, or money deposited or collected, or any other source. And such, in my judgment, is its fair commercial and judicial construction, and any other would make the meaning of the words to depend upon the peculiar circumstances of each particular case, and would produce doubt and uncertainty, and tend to impair the value and the convenience of negotiable paper, and to the promotion of strife and litigation. . . . It is not to be supposed that the parties meant that the pittance of each day's work should be withheld from the necessities of the laborer's family till they should accumulate to the amount of the bill. The law does not require it, and political economy and common humanity forbid it." In *Huntton v. Ingraham*, 1 Strob. 271, it was held that where a factor accepts a planter's order, payable when in funds, this is a promise to pay out of the first funds which shall come into his hands; and the drawee cannot apply them first to the payment of a debt due him from the drawer, as this would be "adding another condition to the acceptance, and the acceptance would then mean, they would pay the order when they had funds in hand over and above the amount of their debt." It seems that the factor may, however, deduct expenses incurred by him, with reference to the particular consignment. *Ibid.* In *Campbell v. Pettengill*, 7 Greenl. 126, "funds" was held to mean cash, and not good and available demands or securities till converted into money. The court also express an opinion that, although the drawer is not entitled to notice when he has no funds in the drawee's hands, yet where, instead of funds, the drawee has available demands, notice must be given to the drawer. In *Andrews v. Baggs, Minor*, 173, it was held, that, in order to recover of the drawer on a bill accepted when in funds, it is necessary to prove that the acceptor had received funds sufficient to pay the bill according to its terms, demand by the holder, and notice of non-payment to the defendant. See *Gallery v. Prindle*, 14 Barb. 186; *Knox v. Reeside*, 1 Miles, 294. In *Swansey v. Breck*, 10 Ala. 533, it was held, that, if the administrator of the drawee receives the funds, he is liable on the deceased's acceptance. A general acceptance of an order payable out of a particular fund imposes upon the plaintiff the obligation of showing that the particular fund was received by the acceptor. *Owen v. Lavine*, 14 Ark. 389. Where A placed a note in B's hands, for which B is to account, and afterwards A draws on B an order payable out of the first proceeds of the note, and B accepts; it is no defence for B, that the note was put into his hands before the order was drawn. *Bird v. McElvaine*, 10 Ind. 40. An acceptance of an order to pay \$200 out of the first money of the drawer received by the drawee on account of a newspaper establishment, binds the acceptor to pay, from time to time, on reasonable request, as money is received, and a judgment against him for a part of the sum, on his refusal to pay on request, is no bar to a subsequent action for a further sum received by him after the commencement of the first action. *Shaw, C. J.* said: "The question is, whether, by a fair construction, the acceptance in the present case is an undertaking to perform one duty at one time, and then to terminate, or whether it is a stipulation to do more than one. It is an acceptance and undertaking to pay the plaintiff \$200 out of the first money belonging to the drawer, which the acceptor should receive on account of the Eastern Star, a

afterwards allege a want of consideration in an action by the holder. (q)

An absolute acceptance of an order payable on a contingency is the same in legal effect as if the instrument had all the requisite certainties of a bill of exchange with a conditional acceptance. Thus, an absolute acceptance of an order payable in the goods of the drawer, or the proceeds thereof, amounts to an agreement to pay the order according to its tenor, and, in order to recover on such acceptance, the holder must aver and prove that the drawee had in his hands either the goods specified or the proceeds. (r) An acceptance of an order for the payment of money out of the amount to be advanced to the drawer when certain houses, which he was then erecting on the drawee's land, should be so far completed as to have the plastering done according to a contract between the parties, is conditional; and the acceptor's liability is dependent upon the contingency of the work being completed according to the contract, nor will such acceptance become absolute by a subsequent cancellation of the contract by the drawee and the assignee of the drawer. (s) Compliance with the condition is in the nature of a condition precedent, and if the condition is not complied with, the acceptance is of no effect.

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newspaper establishment, transferred by the drawer to the acceptors. It is obviously a conditional undertaking. Was the whole obligation to be void, if the amount collected should not reach \$200, and all right to demand anything suspended until the full sum should be received? We cannot consider this the true meaning. It appears to us that the intention was, that the acceptors should pay to the amount of \$200, if so much should be collected; otherwise, such part of the sum as should be collected. This seems to have been the construction adopted by the acceptors, by their paying a part, and yielding to a judgment for a part. But if payment was not to be suspended until the full \$200 should be collected, and as it might never be collected, then the conclusion of law must be, that such part as should be collected should be paid in reasonable time, if requested. No other reasonable construction can be put upon it. It is a general rule, that when a duty is to be done, and no time fixed, it must be done in a reasonable time. Taking this legal conclusion, in connection with the terms of the acceptance, it is an undertaking to pay out of a particular fund, from time to time as received, on reasonable request. The payment, therefore, of part of the amount does not bar the claim for the balance when collected; and we think the contract, being to pay from time [to time] on request, is a contract to be performed at different times, and therefore a judgment for one breach, in not paying a part, is not a bar to an action on another breach, in not paying on demand the balance admitted to have been collected." *Perry v. Harrington*, 2 Met. 368.

(q) *Kemble v. Lull*, 3 McLean, 272.

(r) *Atkinson v. Manks*, 1 Cowen, 691

(s) *Newhall v. Clark*, 3 Cush. 376.

Thus, where an agreement was made to accept, in consideration that goods of a certain value should be consigned to the acceptor to answer the bill, and goods of a less value were sent, the acceptance was held not to be binding.<sup>(t)</sup> And where a person agreed to accept provided the goods against which the bill was drawn should be sold before the maturity of the bill, and they were attached by a creditor of the drawer while in the drawee's hands, it was held that there was no acceptance.<sup>(u)</sup> It would seem that, even if the drawee himself should, by any act, prevent the contingency from happening, he could not be liable as acceptor. The remedy of the holder would probably be by a special action on the case, and the sum to be recovered would not be the debt due by the acceptance, but damages for the wrongful act of the acceptor in preventing the completion of the contract, by reason of which the holder has sustained the loss of the debt. The burden of proof would be upon the plaintiff to show that the defendant caused the prevention of the completion of the contract, and any evidence on the part of the acceptor to show that the drawer had failed or been unable to perform the contract, by reason of death, sickness, insolvency, or other inability, would be competent to rebut the charge.<sup>(v)</sup>

Whether an acceptance payable at a particular place is a conditional acceptance, or not, has been much discussed, and the opinions of many learned judges have been given on both sides of the question. The Court of King's Bench, in England, for a long time held such an acceptance not to be conditional; that the word "Accepted" expressed the contract, and the words "payable at a certain place" were in effect a memorandum which was inserted as a kind of accommodation between the parties, to which the holder of the bill was not bound to attend.<sup>(w)</sup>

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(t) *Mason v. Hunt*, 1 Doug. 297.

(u) *Browne v. Coit*, 1 McCord, 408.

(v) *Shaw, C. J., Newhall v. Clark*, 3 Cush. 376.

(w) The first case was that of *Smith v. De la Fontaine*, Holt, N. P. 366, note (1785), where Lord *Mansfield*, at *Nisi Prius*, held such an acceptance absolute, and proof of demand at the place specified unnecessary. The same was held, at *Nisi Prius*, by Lord *Ellenborough*, in *Lyon v. Sundius*, 1 Camp. 423 (1808); and, in reference to a note, in an action against the maker, by *Bayley, J.*, in *Wild v. Rennards*, id. 425, note (1809), and by Lord *Ellenborough*, in *Nicholls v. Bowes*, 2 id. 498. These cases were followed by *Fenton v. Goundry*, 13 East, 459 (1811), where this rule was laid down by an authoritative decision of the King's Bench, Lord *Ellenborough, C. J.* and *Grose* and *Bayley*,



The Court of Common Pleas, on the other hand, held that such an acceptance was conditional ; that all the words taken together expressed the contract, which was, that the acceptor promised to pay, provided the bill was presented at the place mentioned, and that presentment at the place stipulated must be averred and proved.(x) The point was finally settled, at law, by the House

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JJ. delivering opinions. In *Hodge v. Fillis*, 3 Camp. 463 (1813), the drawer drew the bill payable in London, and the acceptor accepted it payable at a banker's there. Lord *Ellenborough* held that an averment of presentment at the banker's was material, and must be proved. *Gibbs*, C. J. followed these decisions in *Head v. Sewell*, Holt, 363 (1816), but there seems to be some doubt about the correctness of this report. The cases in the King's Bench, with reference to promissory notes payable at a specified place, seem hardly to be consistent with the doctrine laid down by the same court in reference to bills of exchange. In *Sanderson v. Bowes*, 14 East, 500, *Dickinson v. Bowes*, 16 id. 110, and *Howe v. Bowes*, id. 112, it was decided that a demand of payment of a note at the place specified was necessary, and the following distinction was taken : that the place, being specified in the body of the note, is incorporated in the original form of the instrument, while the place designated in the acceptance was no part of the original conformation of the bill itself. This distinction can hardly be sustained. Lord *Eldon*, in his opinion in *Rowe v. Young*, 2 Bligh, 391, *infra*, note y, said with reference to it : " Somehow or other it seems to have been assumed, that, not being in the body of the bill, it is not to be considered as being in the body of the acceptance, a conclusion which it is extremely difficult, I think, to adopt." *Bayley*, J., in the same case, said : " I am free to confess that I doubt the propriety of those decisions (*Sanderson v. Bowes*, *Dickinson v. Bowes*, *Howe v. Bowes*), although I was myself a party to them, and I think it more manly to say that I consider my opinion in those cases erroneously formed, than to attempt to distinguish those cases from *Fenton v. Goundry* by the use of nice and subtle differences." Another distinction taken is, that the one class of decisions refers to promissory notes, and the other to bills of exchange ; but this ground is hardly tenable. Another is, that the notes were payable on demand, while the bills or acceptances were payable at a particular time, and that in the latter case the defendant may readily make an averment that he was ready at the time and place to pay, and that the other party was not ready to receive the money ; but in the former, as the time of payment depends entirely upon the pleasure of the holder of the note, the defendant cannot set up such a defence. On this ground, if any, it is apprehended that the two classes of cases may be distinguished. In *Parker v. Gordon*, 7 East, 385, it was decided that presentment for payment of a bill accepted payable at the acceptor's banker's after banking hours was insufficient, and no evidence of dishonor, so as to charge the drawer. In this case no presentment to the acceptor himself was shown, and it was an action against the drawer ; so that a distinction may well be drawn between this case and the others mentioned above. See also *Elford v. Teed*, 1 Maule & S. 28. In *Roche v. Campbell*, 3 Camp 247, an action by an indorsee of a note, payable at a specified place thirty-one days after date, against an indorser, Lord *Ellenborough* held it to be a fatal variance not to state that the note was so payable in the declaration.

(x) The first case in the Common Bench was *Ambrose v. Hopwood*, 2 Taunt. 61 (1809), an action against the drawer, where it was held, that, if the declaration alleges a bill to be accepted payable at the house of certain persons at a particular place, it



of Lords, who decided that, if a bill of exchange is accepted payable at the house of A & Co., it is a conditional acceptance, restricting the place of payment, and the holder is bound to present the bill at that house for payment in order to charge the acceptor of the bill. If he brings an action upon the bill against the acceptor, he must in his declaration aver, and on the trial prove, that he made such presentment, and for want of such averment the declaration was held bad on demurrer, thereby reversing the judgment of the King's Bench.<sup>(y)</sup> In consequence

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must aver that the bill was presented for payment at that place, and not to those persons generally. Then followed *Callaghan v. Aylett*, 3 id. 397, 2 Camp. 549 (1811), a suit by the drawer against the acceptor, which decided that, if a bill is accepted payable at a banker's, it must be presented there for payment, and neglect so to present it discharges the acceptor. The next case was *Gammon v. Schmoll*, 5 Taunt. 344 (1814), where the court adhered to their former decisions, notwithstanding the cases in the King's Bench, *Heath*, *Chambre*, and *Dallas*, JJ. delivering opinions. The case of *Bowes v. Howe*, id. 30, in the Exchequer Chamber (1813), sustained the decision of the King's Bench in reference to promissory notes, but reversed it on another point. *MacDonald*, C. B. delivering the opinion. It has been decided in *Saunderson v. Judge*, 2 H. Bl. 509, *Richards v. Milsington*, Holt, 364, note, *Price v. Mitchell*, 4 Camp. 200, *Exon v. Russell*, 4 Maule & S. 505, that if the place was specified in a memorandum at the foot of the bill or note, under the signature of the maker or acceptor, the payment was not conditional. This has been so decided since the Stat. 1 & 2 Geo. IV. c. 78, in *Williams v. Waring*, 10 B. & C. 2, 5 Man. & R. 9, and it was held in *Exon v. Russell*, 4 Maule & S. 505, that a description of a note with such a memorandum at the foot, as payable at a particular place, is a variance. *Contra*, *Sproule v. Legg*, 3 Stark. 156. But if the declaration merely states that the maker made the note payable at the place, without saying that it was so payable according to the tenor of the note, this does not amount to a misdescription, and may be rejected as superfluous. *Hardy v. Woodroffe*, 2 Stark. 319. In *Trecothick v. Edwin*, 1 id. 468, Lord *Ellenborough* held, that, if the memorandum is printed, it must be considered as a part of the note, having been made at the same time. But *quære*. There appears to have been no doubt but that, in cases between the indorsee and drawer, in both courts, a presentment at the place designated in the acceptance was necessary; so where the place was specified by the drawer in the body of the bill. *Tindal*, C. J., *Gibb v. Mather*, 8 Bing. 214. See *Roche v. Campbell*, 3 Camp. 247.

(y) *Rowe v. Young*, 2 Brod. & B. 165, 2 Bligh, 391 (1820), Lords *Eldon* and *Redeſdale* delivering opinions. The opinions of the twelve judges had been taken on the following points. First, whether the holder was bound to present the bill at the place designated. This was answered in the affirmative by *Dallas*, C. J., *Best*, *Burrough*, *Park*, *Richardson*, JJ., *Garrow*, *Wood*, BB.; in the negative by *Abbott*, C. J., *Bayley*, *Holroyd*, JJ., *Richards*, C. B., *Graham*, B. (7 — 5). Second, whether it is necessary that such presentment should be averred in the declaration. This was answered in the affirmative by *Dallas*, C. J., *Burrough*, *Park*, JJ., *Wood*, B.; in the negative by *Abbott*, C. J., *Best*, *Bayley*, *Holroyd*, *Richardson*, JJ., *Richards*, C. B., *Garrow*, *Graham*, BB. (4 — 8). It will be observed that the case was decided against the opinions of the majority of the judges, as to this last point. The ground taken by those who answered in the negative was, that the acceptor's readiness to pay at the place

of this decision, the statute 1 & 2 Geo. IV. c. 78, was passed, reciting that the practice and understanding of merchants had been contrary to this decision. It enacted, that an acceptance payable at a particular place, without further expression, shall not be deemed a conditional acceptance; but if it is payable at a specified place "*only, and not otherwise or elsewhere,*" it shall be considered conditional.<sup>(z)</sup> The courts in this country have,

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should be set forth by him, as a matter of defence, in a special plea averring that fact. The reason for sustaining the affirmative was, that the plaintiff must declare upon the contract, and must aver everything material that the contract contains. Third, whether such acceptance was conditional or not. This was answered in the affirmative by the same judges who decided the affirmative of the first question; in the negative, by those who decided the negative of the same. Fourth, whether the payee, by taking an acceptance qualified as to the place of payment, without the authority or consent of the drawer, would discharge the drawer, so that the payee could maintain no action against him upon the bill. An opinion that he would not be discharged, unless it could be shown that he was injured or materially inconvenienced, was expressed by *Bayley, Best, Burrough, Park, Richardson, JJ., Garrow, Wood, BB.*; that no action could be maintained upon the bill, by *Abbott, C. J., Holroyd, J., Richards, C. B.* The difficulty on this point seemed to be, whether making the discharge of the drawer depend upon the question of inconvenience or injury would not be introducing too lax a rule, and give rise to great uncertainty, and hence it would be better to lay down the rule, that the drawer would be discharged, in all such cases, unless notice was sent to him. Some of the judges expressed an opinion that it would be immaterial if the place specified were in the same town where the acceptor lived; otherwise if in a different town. In *Rhodes v. Gent*, 5 B. & Ald. 244, the acceptance was payable, when due, at a particular place, but the bill was not presented till some days after maturity. The acceptor was still held liable, having sustained no injury thereby. *Abbott, C. J.* said: "The case of *Rowe v. Young* goes the length of holding that a presentment is necessary at the particular place specified; and perhaps it may go further, and may exonerate the acceptor in case, by the omission to present in time, he sustains any actual prejudice; but it cannot extend to a case like the present, where no such injury is proved to have arisen in consequence of the omission to present the bill for payment when due."

(z) This statute, called Sergeant Onslow's act by *Best, C. J.*, *Selby v. Eden*, 3 Bing. 611, 613, has been held to apply, in the case of bills, to actions against the acceptor alone. In a suit against the drawer, presentment at the place designated must be proved. *Gibb v. Mather*, 8 Bing. 214, 1 Moore & S. 387, 2 Crompt. & J. 254. *Tindal, C. J.* said: "In cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary in order to make the drawer liable upon the dishonor of the bill by the acceptor." "It appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange; but that it is confined in its operation to the case of acceptors alone." See *Emblin v. Dartnell*, 12 M. & W. 830. It has been decided, that where the place is designated in the body of the bill, an acceptance is absolute, unless it contains the words required by the statute, or their equivalent. *Selby v. Eden*, 3 Bing. 611, 11 J. B. Moore, 511; *Fayle v. Bird*, 6 B. & C. 531, 2 Car. & P. 303, 9 Dow. & R. 639, where Lord *Tenterden* said that he should have entertained some doubt whether the case

with the exception of Louisiana and Indiana, held that such acceptances were not conditional; that demand of payment at the place specified need not be averred by the plaintiff; but that if the acceptor was at the place at the time designated, and ready to pay the money, it was a matter of defence to be pleaded on his part, which defence, however, is no bar to the action, but goes only in reduction of damages, and in prevention of costs.<sup>(a)</sup> If

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was within the statute, had it not been for the authority of *Selby v. Eden*. In *Turner v. Hayden*, 4 B. & C. 1, 6 Dow. & R. 5, Ryan & M. 215, the holder of a bill accepted payable at a banker's, the words "only, and not elsewhere," being omitted, did not present it there for payment, and the banker three weeks after failed, having held during that time a balance in favor of the acceptor above the amount of the bill. It was held that the acceptor still continued liable, although he was subjected to the loss of the money by the omission of the holder to present the bill there for payment. So *Sebag v. Abitbol*, 4 Maule & S. 462, decided before the statute. In *Sharp v. Bailey*, 9 B. & C. 44, 4 Man. & R. 4, the drawer made the bill payable at his own house, and it was held that the jury might infer from this fact that the bill was an accommodation bill, and notice of non-payment by the acceptor to the drawer was unnecessary. The statute applies to bills made payable at a particular place by the act of the drawer, as well as where rendered so payable by the act of the acceptor. *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 531. See *Halstead v. Skelton*, 5 Q. B. 86; *Blake v. Beaumont*, 4 Man. & G. 7.

(a) This point has been decided more frequently with regard to the makers of promissory notes than acceptors of bills of exchange, yet the courts make no difference between them in this respect. In *U. S. Bank v. Smith*, 11 Wheat. 171, *Thompson, J.* expressed an opinion that demand at the place need not be averred, but there was no decision on this question. It was decided, however, in *Wallace v. M'Connell*, 13 Pet. 136, where the cases are collected and commented upon at length. Judge Story, *Promissory Notes*, § 228, note, says that he dissented, but his dissent does not appear in the report. Other cases approving this doctrine are *Covington v. Comstock*, 14 Pet. 43; *Brabston v. Gibson*, 9 How. 263; *Thompson v. Cook*, 2 McLean, 122; *Silver v. Henderson*, 3 id. 165; *Brown v. Noyes*, 2 Woodb. & M. 75; *Martin v. Hamilton*, 5 Harring. Del. 314, 329; *Stowe v. Colburn*, 30 Maine, 32; *Nichols v. Pool*, 2 Jones, N. Car. 23; *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 id. 248; *Fitler v. Bekley*, 2 Watts & S. 458; *Fairchild v. Ogdensburgh, &c. R. Co.*, 15 N. Y. 337, *Denio, C. J.*, where it was decided that the defence of readiness to pay at the time and place mentioned goes in mitigation of damages and costs, and not to the cause of action; *Fleming v. Potter*, 7 Watts, 380, where the same rule was applied in case of a note payable in specific articles. See *Caldwell v. Cassidy*, 8 Cowen, 271, an action against the maker of a promissory note in which a plea was held bad on demurrer, because it set forth this defence in bar of the action, and not of the damages; and secondly, for not showing that the defendant was ready, by paying the money into court. *Savage, C. J.* said, that he thought an account of demand would be necessary in case of a note payable on demand at a particular place, but in *Haxtun v. Bishop*, 3 Wend. 1, he decided that it was not. *Green v. Goings*, 7 Barb. 652. See *Ruggles v. Patten*, 8 Mass. 480; *Carley v. Vance*, 17 id. 389, where the plea was held bad for want of profert; *Payson v. Whitcomb*, 15 Pick. 212; *Carter v. Smith*, 9 Cush. 321; *Eastman v. Fifield*, 3 N. H. 333; *Otis v. Barton*, 10 id. 433; *Hart v. Green*, 8

a bill were accepted "payable *only* at such a place," it would be so entirely conditional under the English statutes, that, if not demanded there, the acceptor would not be liable at all. We think this should be the rule in the United States; on the ground that such words are equivalent to "Accepted, provided that," or "on condition that"; but it is not certain that a bill accepted with the word "only," or possibly with express words of condition, might not be held by some courts as binding the acceptor to the amount of the bill, but discharging him from interest and costs, if he had funds at the proper place at the maturity of the bill, by which it would then and there have been paid. The principle upon which any such decision must be founded is, that the having the funds there for that purpose operates as a tender of them.

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Vt. 191; *Eldred v. Hawes*, 4 Conn. 465; *Jackson v. Packer*, 13 id. 342; *Bond v. Storrs*, id. 412; *Bacon v. Dyer*, 3 Fairf. 19; *Remick v. O'Kyle*, id. 340, where presentment was averred and the plaintiff was allowed to recover without introducing evidence to support it; *McKenney v. Whipple*, 21 Maine, 98; *Gammon v. Everett*, 25 id. 66; *Lyon v. Williamson*, 27 id. 149; *Dockray v. Dunn*, 37 id. 442; *Weed v. Van Houten*, 4 Halst. 189; *Bowie v. Duvall*, 1 Gill & J. 175; *Allen v. Miles*, 4 Haring. Del. 234; *M'Nairy v. Bell*, 1 Yerg. 502; *Mulherrin v. Hannum*, 2 id. 81; *Blair v. Bank of Tenn.*, 11 Humph. 84; *Bank of Ky. v. Hickey*, 4 Littell, 225; *Conn. v. Gano*, 1 Ohio, 483, where it was also held that the averment, though immaterial, yet, if made, must be proved, *Pease*, J. dissenting; *Butterfield v. Kinzie*, 1 Scamm. 445; *Armstrong v. Caldwell*, id. 546; *New Hope D. B. Co. v. Perry*, 11 Ill. 467; *Irvine v. Withers*, 1 Stew. Ala. 234; *Montgomery v. Elliott*, 6 Ala. 701; *Watkins v. Crouch*, 5 Leigh, 522; *Armistead v. Armisteads*, 10 id. 512; *Sumner v. Ford*, 3 Pike, 389; *McKiel v. Real Estate Bank*, 4 id. 592; *Pryor v. Wright*, 14 Ark. 189; *Dougherty v. Western Bank*, 13 Geo. 287; *Clarke v. Gordon*, 3 Rich. L. 311; *McKenzie v. Durant*, 9 id. 61; *Bank of S. Carolina v. Flagg*, 1 Hill, S. Car. 177; *Bank of N. Carolina v. Bank of Cape Fear*, 13 Ired. L. 75; *Henshaw v. Liberty M. F. & L. Ins. Co.*, 9 Misso. 333, where the note was payable in paper currency; *Edwards v. Hasbrook*, 2 Texas, 578; *Andrews v. Hoxie*, 5 id. 171; *Games v. Manning*, 2 Greene, Iowa, 251, where it was held that the same rules were applicable in case of a note payable in specific articles; *Washington v. Planters' Bank*, 1 How. Miss. 230; *Cook v. Martin*, 5 Smedes & M. 379, where proof of an averment of demand at the place was held unnecessary. Some of the American cases hold an averment and proof of demand necessary in the case of notes payable on demand, no time being specified. *Thompson, J.*, *Wallace v. M'Connell*, 13 Pet. 143; *Bank of N. Carolina v. Bank of Cape Fear*, 13 Ired. L. 75; *Armistead v. Armisteads*, 10 Leigh, 512, *Stanard, J.*, who said that this principle would extend to the case of notes payable on demand, after a specified time. *Savage, C. J.*, *Caldwell v. Cassidy*, 8 Cowen, 271. The cases denying this are *McKenney v. Whipple*, 21 Maine, 98; *Gammon v. Everett*, 25 id. 66; *Haxtun v. Bishop*, 3 Wend. 1; *Montgomery v. Elliott*, 6 Ala. 701; *Dougherty v. Western Bank*, 13 Geo. 287; but the court held in this case that averment and demand at the place are necessary in the case of a bank-note payable on demand at a specified place. *Quære*. The reason given is public policy. The same was held in the case of a bank-note in *Bank of N.*

The cases which we have been considering are, as our notes show, in a curious state of conflict, confusion, and uncertainty. A great number of fine, subtle distinctions have been made on a comparatively narrow point, and it seems as if ingenuity and acuteness had been exerted to make refinements in an important commercial question, instead of an endeavor to carry out the real and honest intentions of the contracting parties, and to produce uniformity in the law precisely there where uniformity is eminently desirable.

A partial or a qualified acceptance is an agreement by the acceptor to pay the bill, but at a different place or time, or in a different manner, from the terms thereof. Thus, where a bill was drawn with a date expressed when it was payable, and the drawee

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*Carolina v. Bank of Cape Fear*, 13 Ired. L. 75; but there it was held that there was no difference between notes by a natural person and those of a corporation, in this respect. In *New Hope D. B. Co v. Perry*, 11 Ill. 467, in an action on a bank-bill payable at a particular place on demand, it was held that it was not necessary to aver and prove a demand at that place. In Louisiana, demand at the time and place was formerly considered necessary. *Mellon v. Croghan*, 15 Mart. La. 423; *Smith v. Robinson*, 2 La. 405; *Erwin v. Adams*, id. 318; *Morton v. Pollard*, 10 id. 552; *Warren v. Allnutt*, 12 id. 454; *Fort v. Cortes*, 14 id. 180; *Hamer v. Johnson*, 15 id. 242; *Hart v. Long*, 1 Rob. La. 83; *Stillwell v. Bobb*, id. 311; *Wood v. Mullen*, 3 id. 395; *Funes v. U. S. Bank*, 10 id. 533. But these cases have been overruled. *Ripka v. Pope*, 5 La. Ann. 61; *McCallop v. Fluker*, 12 La. Ann. 551. In *Picquet v. Curtis*, 1 Sumner, 478, *Story, J.* said: "The decision of the House of Lords in the great case of *Rowe v. Young* settled the law, as to inland bills, upon principles which strike my mind as irresistible." The cases in Indiana are *Palmer v. Hughes*, 1 Blackf. 328; *Gilly v. Springer*, id. 257. See *Alden v. Barbour*, 3 Ind. 414. In *Bassett v. Wills*, 4 Leigh, 114, the note was made negotiable at a certain bank. Held, that although negotiable there, it was not therefore payable there, and that an averment of presentation at the bank need not be proved.

In an action against the drawer or indorser, it is necessary to aver and prove demand at the place. The reason is, that their undertaking is conditional, while that of the maker and acceptor is primary. *U. S. Bank v. Smith*, 11 Wheat. 171; *Berkshire Bank v. Jones*, 6 Mass. 524; *Woodbridge v. Brigham*, 12 id. 403, corrected 13 id. 556; *Hart v. Green*, 8 Vt. 191, 194, per *Phelps, J.*; *Allen v. Smith*, 4 Harring. Del. 234, per *Booth, C. J.*; *Shaw v. Reed*, 12 Pick. 132; *North Bank v. Abbot*, 13 id. 465; *Bank of Wilmington, &c. v. Cooper*, 1 Harring. Del. 10; *Tuckerman v. Hartwell*, 3 Greenl. 147. In this last case, *Mellen, C. J.* denies that there is any difference whether the action is brought against a drawer or indorser, or against an acceptor or maker. See *Irvine v. Withers*, 1 Stew. Ala. 234; *Roberts v. Mason*, 1 Ala. 373; *Glasgow v. Pratte*, 8 Misso. 336; *Sullivan v. Mitchell*, 1 N. Car. L. Rep. 482. See *Smith v. M'Lean*, 2 Taylor, N. Car. 72; *Nichols v. Pool*, 2 Jones, N. Car. 23; *Watkins v. Crouch*, 5 Leigh, 522, which was a suit against the maker and indorser jointly, and it was held that it was not maintainable without averment and proof of demand at the place specified. Nor does the acceptance, by the indorser, of an assignment of all the effects of the maker as security for part of the note, dispense with such demand. *Ibid.*

promised to pay it on a subsequent day, the acceptance was held to be good within the custom of merchants. (b) A bill drawn payable November 28, 1836, forty-two months after date, being accepted on condition of its being renewed till November 28, 1844, was held to be a good acceptance, and the bill to be properly declared on as accepted payable November 28, 1844. (c) So a draft payable at sight may be accepted payable at a subsequent day. (d) An acceptance for part of the bill is a good acceptance for that part. Where the drawee of a bill for £ 127 accepted to pay £ 100, part thereof, it was held a binding acceptance. (e) And an acceptance to pay half in money and half in bills, is a good acceptance as to the part payable in money. (f) We have already seen that an acceptance by a partner, in his own name, of a bill drawn on a firm, binds the firm. (g) The same has been held with reference to joint traders, if it concerns the trade; but it is otherwise if it concerns the acceptor in a distinct interest and respect. (h) If a bill drawn on a partnership is not accepted until after a dissolution publicly announced, it binds only the partner accepting it, if the other partners have not consented to his act. (i) It may be stated as the result of the cases, that an acceptance by one of a bill addressed to several, renders the acceptor personally liable. (j)

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(b) *Walker v. Atwood*, 11 Mod. 190.

(c) *Russell v. Phillips*, 14 Q. B. 891.

(d) *Clarke v. Gordon*, 3 Rich. 311. And it is said that, if the drawee of a bill payable at sight promises to pay it if it is presented at a particular time, the plaintiff need not aver or prove presentment at that time. *Ibid.* In *Price v. Shute*, Chitty on Bills, 303, a bill payable Jan. 1st was accepted payable March 1st. The holder struck out this last date and inserted Jan. 1st. The acceptor refused to pay on presentment at that time. The holder then restored the date to March 1st, and recovered against the acceptor. This case has been doubted by *Lawrence, J.*, *Paton v. Winter*, 1 Tannt. 420, and in *Master v. Miller*, 4 T. R. 320.

(e) *Wegersloff v. Keene*, 1 Stra. 214; see *Douglass v. Wilkeson*, 6 Wend. 637, 642.

(f) *Petit v. Benson*, Comb. 452.

(g) *Supra*, p. 123, note k.

(h) *Pinkney v. Hall*, 1 Salk. 126; *Dupays v. Shepherd*, Holt, 296.

(i) *Tombeckbee Bank v. Dumell*, 5 Mason, 56.

(j) *Maule, J.*, *Owen v. Van Uster*, 10 C. B. 318, 1 Eng. L. & Eq. 396.



## SECTION IV.

## ACCEPTANCE FOR HONOR.

THERE can be no acceptance except by a drawee, or by a drawee *au besoin*, or by some one for honor.(*k*) If there purport to be a further or other acceptance, the person making it may be held as a guarantor or otherwise on his contract, (if there is a consideration,) but not as acceptor.(*l*)

If the original drawee refuses to accept the bill, and there is no drawee *au besoin*, or he refuses also, and the bill has been duly protested, then any person may come forward and accept the bill "for honor," and this may be done at the request, and under the guaranty, of the drawee.(*m*) Such acceptance may also be made if the original drawee, after acceptance, absconds or becomes insolvent.(*n*) This last acceptance, "for better security," as it is called, is practised in England much more frequently than in this country.

The acceptor for honor may accept for any one or more, or all the parties antecedent. Properly the acceptance should designate for whose honor it is made, and then it enures to the benefit of that party and of all parties subsequent to him.(*o*) If it is general, it will be taken to be for the honor of the drawer, and enures to the benefit of all parties subsequent. The holder may elect to receive or reject this acceptance at his pleasure.(*p*) If he receives it, then the acceptor is bound to all persons to whom the party for whom he accepts would have been bound. In some instances the acceptor for honor writes over his acceptance "provided due demand be made, and the drawer" (or any other party for whom he accepts) "is duly notified." The object of this is to prevent the acceptor for honor from being liable, unless the party for

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(*k*) *May v. Kelly*, 27 Ala. 497; *Jackson v. Hudson*, 2 Camp. 447; *Polhill v. Walter*, 3 B. & Ad. 114; *Davis v. Clarke*, 6 Q. B. 16. See *Jenkins v. Hutchinson*, 13 Q. B. 752. The drawee may recognize an acceptance as his. See *Lindus v. Bradwell*, 5 C. B. 583.

(*l*) *Jackson v. Hudson*, 2 Camp. 447.

(*m*) *König v. Bayard*, 1 Pet. 250.

(*n*) *Ex parte Wackerbath*, 5 Ves. 574.

(*o*) *Hussey v. Jacob*, 1 Ld. Raym. 88; *Lewin v. Brunetti*, 1 Lutw. 896, Carth. 199.

(*p*) *Mitford v. Walcot*, 12 Mod. 410; *Gregory v. Walcup*, 1 Comyns, 75.



whose honor the acceptance is made is himself liable. We think, however, that the law merchant would itself make this provision, unless there was an express or implied waiver by the acceptor for honor.(q)

The holder cannot look to the prior parties of a foreign bill, unless he protested the bill for the non-acceptance of the drawee, and gave them due notice.(r) And this should regularly be done, even where there has been a proper acceptance, and, the drawee having failed or absconded, a subsequent acceptance for honor is made.

For the reason that an acceptance for honor cannot properly be made until the bill has been protested for non-acceptance ; or, if the acceptor have failed or absconded, for better security ; such acceptance is usually designated in England and in this country as an acceptance *supra protest* ; this being required by the law merchant as the only appropriate proof of that failure or refusal to accept of the proper person, which alone gives to a third party the right to come in and accept "for honor."(s) A holder, as we have said, may entirely refuse an acceptance for honor ; in which case he has, of course, no claim whatever against one who proposes to be an acceptor for honor, or becomes so without the assent of the holder. If he receives this acceptance, he can demand payment of the bill from the acceptor for honor only at its maturity.(t) So, also, all of those for whose honor the bill is accepted are protected by it, if such acceptance is received, in the same manner in which they would have been by a regular acceptance by the drawee. If the acceptance be without limitation, we have seen that it is construed as an acceptance for the honor of the drawer, but it may be for the honor "of the bill," or "of all the parties," and then it must be so expressed ; (u) but if it be a special acceptance for the honor of one or more of the prior parties who are particularly designated, it is not for

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(q) *Baring v. Clark*, 19 Pick. 220.

(r) *Phoenix Bank v. Hussey*, 12 Pick. 483.

(s) *Phoenix Bank v. Hussey*, 12 Pick. 483.

(t) *Williams v. Germaine*, 7 B. & C. 468, 1 Man. & R. 394, 403. Lord *Tenterden* said : An acceptance for honor "is equivalent to saying to the holder of the bill, 'Keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it is not paid by the party on whom it was originally drawn, come to me and you shall have the money.'"

(u) See *Gazzam v. Armstrong*, 3 Dana, 554.

the honor of those prior to the party for whom it is accepted, and they are excluded from its benefit and protection.(v) And it seems that the holder, if he has duly notified these unprotected parties of the non-acceptance, may immediately resort to them for payment, in the same manner as if there were no acceptance at all.(w)

The drawee may himself refuse to accept the bill generally, and may then accept it *supra* protest for some one or more of the parties; as, for instance, he may refuse to accept it for the drawer, and may then accept it for the honor of an indorser.(x) But if it was his duty to accept it generally, by reason of the state of his accounts with the parties, he gains nothing by refusal and subsequent acceptance *supra* protest; nor would he in any case, if this subsequent acceptance *supra* protest were general, or for all parties to the bill.(y) There may be successive acceptors for honor, for the reason that there may be many persons for whom acceptance *supra* protest may be made. There can be but one such acceptance for one person, if that be received by the holder; but there may be a separate acceptance by as many persons, for the honor of each party to the bill, as there are such parties.(z) It has been held that an acceptor *supra* protest for the honor of the first indorser, may require of the holder as a condition of payment that the bill shall be indorsed to him.(a)

The acceptor *supra* protest is bound to all persons to whom the acceptor would have been bound, as has been said, but he is not bound to them in the same way, or on the same conditions. A drawee becomes by acceptance an absolute promisor, like the maker of a note; and the drawer is as his indorser. But an acceptor for honor is liable rather as an indorser; for he is

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(v) Beawes, p. 459.

(w) Beawes, p. 459.

(x) Beawes, pl. 33.

(y) *Schimmelpennich v. Bayard*, 1 Pet. 264. *Marshall*, C. J. said: "If the drawees, refusing to honor the bill, and thus denying the authority of the drawer to draw upon them, were bound, in good faith, to accept or pay as drawees, they will not be permitted to change the relation in which they stand to the parties on the bills by a wrongful act. They can acquire no rights, as the holders of bills paid *supra* protest, if they were bound to honor them in their character of drawees."

(z) Beawes, pl. 42.

(a) *Freeman v. Perot*, 2 Wash. C. C. 485.

bound to pay only on condition that the bill shall be again presented for payment at maturity to the drawee (who may in the mean time be furnished with funds), and, if not then paid, be regularly protested for non-payment, and notice given to him. (b)

Where a bill drawn on a merchant in Liverpool, payable in London, was presented to the drawee, who refused to accept; and was subsequently accepted in London for the honor of the payee, "if regularly protested and refused when due," it was held that a presentment for payment to the drawee in *Liverpool*, a refusal by him, and a protest there, were necessary in order to charge the acceptor for honor. (c) Evidence was introduced in this case to show that the usage under such circumstances was to have the protest for non-payment made in London; but the

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(b) *Hoare v. Cazenove*, 16 East, 391. Lord *Ellenborough* said: "The question, therefore, is, whether a presentment to the drawees for payment, and a protest for non-payment by them, is or is not essential as a previous requisite to the maintaining of an action against these defendants, the acceptors for the honor of the first indorsers; and this depends upon the nature and obligation of an acceptance for the honor of the drawer or indorser. If an acceptance in these terms be an engagement by the person giving it that he will pay the bill when it becomes due, and entitles the holder to look to him in the first instance, without a previous resort to any person, the plaintiffs are in that case entitled to recover upon their second count; but if such an acceptance be in its nature qualified, and amount to a collateral engagement only, i. e. an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonoring this bill, and such dishonor by him should be notified, by protest, to the person who has accepted for the honor of the indorser, — then the necessary steps have not been taken upon this bill, and the plaintiffs cannot recover. And such, after much consideration, we are of opinion, is the case. . . . The use and convenience, and indeed the necessity, of a protest upon foreign bills of exchange, in order to prove, in many cases, the regularity of the proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have required it. And indeed the reason of the thing, as well as the strict law of the case, seems to render a second resort to the drawee proper when the unaccepted bill still remains with the holder; for effects often reach the drawee who has refused acceptance in the first instance, out of which the bill may, and would be, satisfied, if presented to him again when the period of payment had arrived. And the drawer is entitled to the chance of benefit to arise from such second demand, or at any rate, to the benefit of that evidence which the protest affords, that the demand has been made duly, without effect, as far as such evidence may be available to him for purposes of ulterior resort." In *Williams v. Germaine*, 7 B. & C. 468, the doctrine of *Hoare v. Cazenove* was affirmed, and judgment arrested because the declaration did not aver presentment to the drawee for payment. *Mitchell v. Baring*, 10 B. & C. 4; *Roach v. Ostler*, 1 Man. & R. 120; *Lenox v. Leverett*, 10 Mass. 1; *Schofield v. Bayard*, 3 Wend. 488.

(c) *Mitnell v. Baring*, 10 B. & C. 4, 4 Car. & P. 35, *Moody & M.* 381. See *Schofield v. Bayard*, 3 Wend. 488.

court held that the peculiar form of the acceptance rendered an inquiry into this custom irrelevant and unnecessary. In consequence of this doubt thrown on the validity of the usage, the statute 2 & 3 Wm. IV. c. 98 was passed, which, after reciting that doubts had arisen on this point, and the expediency of removing them, enacted that bills so accepted may be protested for non-payment in the places in which the drawers made them payable, without further presentment to the drawees, unless the amount owing upon such bills of exchange shall have been paid to the holders on the day on which the bills would have become payable had they been duly accepted.

If an acceptor for honor pay the bill, or if any one pays for honor *supra* protest, although he did not accept, he may resort for full indemnity for his payment and all legal costs to the person or persons for whose honor he made the acceptance or the payment, and to all parties who would have been liable to those persons had they paid the bill themselves.(d) And he may declare generally upon this custom,(e) or perhaps generally upon a count for money paid to the defendant's use.(f) In an action upon a bill with several indorsements, by one who has paid the bill for the honor of one of the indorsers, it is sufficient, even upon special demurrer, to state that he paid the bill according to the custom of merchants, without stating that he paid it to the last indorsee.(g) Nor can such payment for a party discharged by laches revive his lost liability.(h) If it had been accepted by

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(d) *Leake v. Burgess*, 13 La. Ann. 156; *Gazzam v. Armstrong*, 3 Dana, 554, where *Marshall, J.* said: "We are decidedly of opinion, that he (the acceptor for honor) acquired no demand, or right of action, against any party subsequent to the one for whom he made the payment, and that, even as against the preceding parties, he was only substituted to the rights of that party, in the same condition as if he had paid the bill himself." In *Mertens v. Winnington*, 1 Esp. 113, "Lord *Kenyon* was of opinion that when a bill is so taken up (for honor), that the party who does so is to be considered as an indorsee paying full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill." This seems rather too broad a proposition. "He has the right and remedies of the indorser for whom he pays the bill, if he chooses to put himself in that position." *Erle, J.*, *Goodall v. Polhill*, 1 C. B. 233, 239. It is necessary for the acceptor for honor, on payment of the bill, to give notice of the payment to the party for whom he accepted; otherwise he loses all claim upon him. *Wood v. Pugh*, 7 Ohio, 156.

(e) *Fairley v. Roch*, 1 Lutw. 891.

(f) See *Smith v. Nissen*, 1 T. R. 269; *Vandewall v. Tyrrell*, *Moody & M.* 87.

(g) *Cox v. Earle*, 3 B. & Ald. 430.

(h) See *Higgins v. Morrison*, 4 Dana, 100.

the drawee, and the acceptance for honor had been for better security, the acceptance gives a claim against the acceptor also.(i)

If both drawer and acceptor had become bankrupt, and the acceptance were for the drawer's accommodation, it has been held that the acceptor for honor must first resort to the estate of the drawer.(j) It was, however, held in a subsequent case, that the payer for the honor of the drawer, under similar circumstances, has no claim on the assignees of the acceptor, because the drawer himself had none.(k)

An acceptor for honor of the drawer thereby releases the accommodation acceptor of the bill, because an acceptor for honor can acquire only the rights of the party whom he thus protects, and a drawer has no claim upon an accommodation acceptor.(l) If a drawee who is not bound to accept a bill refuses acceptance, and requests a third person to accept it for honor of an indorser, and guarantees that third person for so doing; if such acceptor for honor pay the bill, he may still resort to the indorser. But the indorser may put in any defence he would have had against the drawee.(m) If an acceptor for honor of an indorser specially promises to pay any person authorized to receive the money and give a valid discharge, it seems that he is not bound to pay unless the holder will put his name on the bill, or give him a bond of indemnity.(n)

If the bill be payable at so many days after sight, and accepted for honor, the time which the bill has to run is computed, not from presentment to the drawee, but from the acceptance *supra* protest.(o)

An acceptor *supra* protest should go before the notary public with witnesses, and declare that he accepts the bill for honor, and designate for whose honor he so accepts. This is at least the usual way, and no very wide departure from it would probably be allowed.(p) But although, when he writes his acceptance on

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(i) *Ex parte Wackerbath*, 5 Ves. 574.

(j) *Ex parte Wackerbath*, 5 Ves. 574.

(k) *Ex parte Lambert*, 13 Ves. 179.

(l) *McDowell v. Cook*, 6 Smedes & M. 420; *Gazzam v. Armstrong*, 3 Dana, 554  
*Ex parte Lambert*, 13 Ves. 179.

(m) *Konig v. Bayard*, 1 Pet. 250.

(n) *Freeman v. Perot*, 2 Wash. C. C. 485.

(o) *Williams v. Germaine*, 7 B. & C. 468, 1 Man. & R. 394, 403

(p) *Gazzam v. Armstrong*, 3 Dana, 554.

the face (as he should), and signs it, it is proper to say, "Accepted *supra* protest," or "for honor," it seems to be sufficient, and may now be even more usual, to say only, "Accepted S. P."

After protest for non-acceptance, whether there be acceptance *supra* protest or not, there should be a regular demand and protest for non-payment, and due notice given, not only to enable the holder to sue all parties, but to enable the acceptor for honor to sue the party for whom he accepts.(q)

The whole law on the subject of the acceptance of bills *supra* protest is quite peculiar, and is a decided exception to the rule that no man can make himself the creditor of another without his authority or consent. For here, any stranger, as we have seen, may become bound for another, and, by satisfying the obligation, acquire a positive claim against him for indemnity, without either authority or consent from him. But the rule is derived from the law merchant, and rests altogether upon the purpose and functions of bills of exchange. It is not yet extended, either in law or by usage, to the case of promissory notes; wherefore, one who pays a note which is overdue, without authority or request from him who owes it, acquires thereby no right against him.

It is said by Chitty, that a presentment should be made to the acceptor for honor after the prior requisites have been performed, and if this is not done, he may be discharged from liability.(r) But we know no authority for this. Before paying, the acceptor should ascertain whether the signature of the party for whose honor he is about to pay is genuine or not. If it is forged, he can have no recourse to the party himself, and unless the forgery be promptly discovered, and immediate notice given to the holder to whom payment had been made, all claim on the latter would be extinguished.(s) And it has been held that the mistake must be discovered, and notice given, on the very day of payment, in order to hold the prior parties; (t) the reason being, that the holder is entitled to know on the day the bill falls due whether it is honored or dishonored. If the acceptor for honor pays the bill, he should declare before a notary that he pays *supra* protest, speci-

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(q) Schofield v. Bayard, 3 Wend. 491.

(r) Chitty on Bills, 351.

(s) Wilkinson v. Johnson, 3 B. & C. 428, 5 Dow. & R. 403.

(t) Wilkinson v. Johnson, 3 B. & C. 428; Cocks v. Masterman, 9 B. & C. 902.

lying the party for whom he pays; and this declaration should be recorded by the notary, either in the protest itself or in a separate instrument.<sup>(u)</sup> Notice should also be given of this payment to the party for whose honor payment is made, otherwise the payer for honor will lose his right to call upon him to refund.<sup>(v)</sup> If the acceptor for honor should himself refuse to pay, there should be still another protest, and notice given to the drawer and indorsers.<sup>(w)</sup> It seems that the formal instrument of protest may be drawn up at any time, even after the commencement of an action by the party paying against the party for whose honor the payment was made.<sup>(x)</sup>

## SECTION V.

### WHAT ACCEPTANCE ADMITS.

EVERY acceptance admits the signature of the drawer, and the acceptor is liable to an innocent holder for value, although the signature be forged.<sup>(y)</sup> If the acceptor, in an action against him

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4 Man. & R. 676. This last case is cited by *Cowen, J.*, *Canal Bank v. Bank of Albany*, 1 Hill, 287, 292, and disapproved, as requiring "an almost impracticable diligence. I doubt whether this case can be sustained, except upon its own peculiar circumstances, if it can be sustained at all."

(u) *Beawes*, pl. 53. In *Geralopulo v. Wieler*, 10 C. B. 690, 709, *Maule, J.* said: "It is a part of the mercantile law respecting payments for honor, that they must be preceded or accompanied by a declaration, made in the presence of a notary, for whose honor he pays the bill, which should be recorded by a notary, either on the protest or in a separate instrument. It would indeed be contrary to a general principle of law and justice, if a person who made a payment, or did an act simply without limit or qualification, could afterwards, by a subsequent declaration limiting or qualifying its effect, affect the right of others. No person, therefore, paying money simply to the holder of a bill, could, by the general rules of law, by a subsequent declaration, cause a payment so made to assume the character of a payment for honor. The custom of merchants requires the declaration which is to qualify the payment to be made in the presence of a notary." See also *Gazzam v. Armstrong*, 3 Dana, 554.

(v) *Wood v. Pugh*, 7 Ohio, 156.

(w) *Chitty on Bills*, p. 352.

(x) So held in *Geralopulo v. Wieler*, 10 C. B. 690. This case explains *Vandewall v. Tyrrell*, *Moody & M.* 87, where a somewhat different rule was apparently laid down.

(y) In *Wilkinson v. Lutwidge*, 1 Stra 648, an action on the case against an acceptor, it was objected that the acceptance could not be proved till after proof of the signature of the drawer. "But as to this, the Chief Justice (*Lord Raymond*) was of opinion that proof of an acceptance was a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his own correspondent, but he said



by an indorser, denies by his plea the handwriting of the drawer, the plaintiff may reply the acceptance by way of estoppel.(z) The acceptance also admits the capacity at that time of the person, to whom the bill is payable, to indorse, and the acceptor cannot afterwards say that this person was a bankrupt,(a) or an infant,(b) or a married woman;(c) although in the latter case, if she indorsed it over, and afterwards her husband exercised his right and indorsed it also, the acceptor might be obliged to pay it twice.(d) Nor can the acceptor say that the bill was drawn upon a corporation which had no power to indorse.(e)

But if the bill be actually indorsed at the time of acceptance, this does not admit the genuineness of the indorsement,(f) unless the name be that of a living person which is forged, and the drawee knew this, and intended to give currency to the bill so indorsed.(g) We should extend this principle so far as to say

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it would not be conclusive evidence." In *Jenys v. Fawler*, 2 id. 946, Lord *Raymond* "strongly inclined that even actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee." In *Price v. Neal*, 3 Burr. 1354, the acceptor, having paid a bill with the signature of the drawer forged, was not allowed to recover back the amount from the indorsee to whom he paid it, on the ground that his acceptance was an admission of the signature. "When a bill is presented for acceptance, the acceptor only looks to the handwriting of the drawer, which he is afterwards precluded from disputing, and it is on that account that an acceptor is liable, even though the bill be forged." Per *Buller, J.*, *Smith v. Chester*, 1 T. R. 654; *Master v. Miller*, 4 T. R. 320; *Dampier, J.*, *Bass v. Clive*, 4 Maule & S. 15; *Porthouse v. Parker*, 1 Camp. 82; *Levy v. Bank of U. S.*, 1 Binn. 27, 4 Dallas, 234; *Peoria, &c. R. Co. v. Neill*, 16 Ill. 269; *Whitney v. Bunnell*, 8 La. Ann. 429. See *Ellis v. Ohio Life, &c. Co.*, 4 Ohio State, 628; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Talbot v. Bank of Rochester*, id. 295.

(z) *Sanderson v. Coleman*, 4 Man. & G. 209. So an indorsement by the payee admits the signature of the maker. *Free v. Hawkins*, Holt, 550.

(a) *Braithwaite v. Gardiner*, 8 Q. B. 473. See *Pitt v. Chappelow*, 8 M. & W. 616; *Drayton v. Dale*, 2 B. & C. 293, 3 Dow. & R. 534.

(b) *Taylor v. Croker*, 4 Esp. 187; *Jones v. Darch*, 4 Price, 300. See *supra*, p. 70.

(c) *Prince v. Brunatte*, 1 Scott, 342, 3 Dowl. Prac. Cas. 382.

(d) *Smith v. Marsack*, 6 C. B. 486.

(e) *Hallifax v. Lyle*, 3 Exch. 446.

(f) *Smith v. Chester*, 1 T. R. 654; *Carvick v. Vickery*, 2 Doug. 653, note; *Robarts v. Tucker*, 16 Q. B. 560.

(g) *Beeman v. Duck*, 11 M. & W. 251. In this case *Parke, B.* remarked, with reference to the case where the drawer and first indorser is the same party, that "it is insisted that in such a case the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties; a doctrine which is clearly established as to bills wherein the signature is not forged." *Robinson v. Yarrow*, 7 Taunt. 455, is cited as the authority for this, and an opinion is intimated that the rule is the same where the drawer's name was forged.

that, whatever objection might exist against a bill, if the drawee accepted the bill with a knowledge of it, the presumption would be that he intended to give currency to that bill, although then objectionable, and that he could not afterwards avail himself of such objection. But acceptance, together with payment by the acceptor, do not admit the genuineness of an indorsement by the payee; and the acceptor may, on discovering that the payee's signature was forged, recover the amount from the party to whom the payment was made.<sup>(h)</sup> If, however, it appears that the payee was never the owner of the bill, nor had any interest in it, and the drawer put it in circulation with the forged signature upon it, the acceptor cannot now recover back the money he has paid from the party to whom he paid it, but may charge it to the drawer, who will be estopped from denying the genuineness of the indorsement.<sup>(i)</sup> If a bill be drawn by one as the agent of another, acceptance admits his authority to draw the bill, but not his authority to indorse it.<sup>(j)</sup> If it be drawn in a fictitious name, the acceptor not only admits this to be good, but is said to be bound by any indorsement of the same name by the same hand.<sup>(k)</sup>

If the drawee of a bill which purports to have been accepted, once admits that the acceptance is his, and so gives currency to the bill, this is in the nature of a conclusive adop-

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*Robinson v. Yarrow* decides that acceptance admits the authority of an agent to draw, but not his authority to indorse, though both signatures are in the same handwriting. *Park, J.* said, that "mere acceptance proves the drawing, but it never proves the indorsement." *Smith v. Chester*, 1 T. R. 654, decides that, in an action by an indorsee against an acceptor, it is necessary to prove the handwriting of the first indorser, but it does not appear that the drawer and first indorser was the same party. There might be a distinction between *Robinson v. Yarrow* and the point under consideration, on the ground that an authority to draw and an authority to indorse are different things. The reason for holding that acceptance admits the drawer's signature, because the acceptor is bound to know the writing of the drawer, might extend also to an indorsement by the same party; and so also the reason that the acceptor is bound to look at the drawer's signature, for if the bill is drawn payable to the order of the drawer, the drawee should look further, and see if the drawer has not ordered it; for if he has not, the bill is incomplete.

<sup>(h)</sup> *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Talbot v. Bank of Rochester*, id. 295; *Dick v. Leverick*, 11 La. 573; *Hortsmann v. Henshaw*, 11 How. 177.

<sup>(i)</sup> *Coggill v. American Bank*, 1 Comst. 113; *Hortsmann v. Henshaw*, 11 How. 177; *Meacher v. Fort*, 3 Hill, S. Car. 227.

<sup>(j)</sup> *Robinson v. Yarrow*, 7 Taunt. 455, 1 J. B. Moore, 150. So, though the indorsement was made before acceptance. *Park, J.*, id.

<sup>(k)</sup> *Cooper v. Meyer*, 10 B. & C. 468; *Beeman v. Duck*, 11 M. & W. 251

tion; and he cannot afterwards defend himself by showing it to be a forgery, even if he made the admission believing the acceptance to be his own.<sup>(l)</sup> If an acceptor who is bound by his admission pay a forged bill, this gives him no claim against an innocent drawer, whose name was used.<sup>(m)</sup> If the acceptor of a bill puts it into circulation, he thereby admits it to be a valid subsisting bill, and cannot afterwards allege that he paid it before maturity.<sup>(n)</sup>

A bill of exchange is presumed to be drawn on funds, with the understanding between drawer and drawee that it is an appropriation of the funds of the former in the hands of the latter, and acceptance is an admission that it was so drawn, and of such a relation between the parties.<sup>(o)</sup> An acceptance for honor does not, however, admit the genuineness of the signature of the party for whose honor the acceptance is made.<sup>(p)</sup> And if the bill is so paid, the person paying may, if due diligence be used, recover back the amount from the holder who received it.<sup>(q)</sup>

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<sup>(l)</sup> *Leach v. Buchanan*, 4 Esp. 226.

<sup>(m)</sup> *Hortzman v. Henshaw*, 11 How. 177.

<sup>(n)</sup> *Hinton v. Bank of Columbus*, 9 Port. Ala. 463.

<sup>(o)</sup> *Jordan v. Tarkington*, 4 Dev. 357; *Raborg v. Peyton*, 2 Wheat. 385; *Hortzman v. Henshaw*, 11 How. 177.

<sup>(p)</sup> *Wilkinson v. Johnson*, 3 B. & C. 428. *Abbott*, C. J. said: "A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor, entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behooves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent for whose honor the payment is asked is actually on the bill; but still his attention may reasonably be lessened by the assertion that the call itself makes to him in *fact*, though no assertion may be made in *words*. And the fault, if he pays on a forged signature, is not wholly and entirely his own; but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, while the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches."

<sup>(q)</sup> *Supra*, § 4.

## SECTION VI.

## EXTINGUISHMENT OF THE OBLIGATION INCURRED BY ACCEPTANCE.

THE holder of an accepted bill, however accepted, may lose his right against the acceptor by waiver, operation of law, payment, release, or other satisfaction. Payment by the acceptor, or a valid release to him, of course discharges the other parties, who are regarded only as his sureties. And the holder may waive the acceptor's obligation orally, and only by implication as well as expressly, provided such waiver be definite, absolute, and unquestionable.<sup>(r)</sup> Still, however, it is held that an express declaration by the holder is necessary to discharge the acceptor, or something which is its complete equivalent. Hence absence for several years will not suffice.<sup>(s)</sup> It is undoubtedly true, that con-

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(r) In an action by indorsees against an acceptor, it was proved that the plaintiffs, having effects of the drawer in their hands, said at a meeting of the defendant's creditors, "that they looked to the drawer, and should not come upon the acceptor of the bill." In consequence of this, the defendant assigned all his property for the benefit of his other creditors, and paid them 15s. on the pound. The drawer's goods in the plaintiffs' hands turned out to be of little value, and this suit was brought to recover of the acceptor. "Lord *Ellenborough* directed the jury to consider whether the language used by the plaintiffs amounted to an absolute unconditional renunciation by them, as holders of the bill, of all claims in respect of it upon the defendants as acceptors, whereby the latter had entered into an arrangement with their creditors. In that case the acceptors were discharged from their liability. . . . On the other hand, if the words only imported that they looked to the drawer in the first instance, . . . that they should not resort to them (the acceptors) if satisfaction could be obtained from another quarter, they did not waive their remedy by this conditional promise, and the acceptors still continued liable until the bill should be actually paid." The jury found for the plaintiffs. *Whatley v. Tricker*, 1 Camp. 35. In *Parker v. Leigh*, 2 Stark. 228, a suit by an indorsee against an acceptor, it was proved that, prior to this action, the plaintiff had threatened to sue the defendant; that the defendant called upon the plaintiff to ascertain the amount of the demand; that the plaintiff showed the defendant an account containing several claims, and among them the bill now sued on; that the plaintiff said that he should look to the drawer for the amount of the bill due, and wanted no more of the defendant than the other claims. The defendant paid the amount, on the supposition that the whole of the plaintiff's demand was included therein, which he said he should not otherwise have done. Lord *Ellenborough* was "of opinion that, in point of law, the circumstances do not amount to an express renunciation, and nothing short of that would be sufficient to discharge the defendant from his acceptance of the bill."

(s) *Dingwall v. Dunster*, 1 Doug. 247; *Ellis v. Galindo*, id. 250, note; *Farquhar v. Southey*, 2 Car. & P. 497. In *Anderson v. Cleveland*, 13 East, 430, note, a suit by an indorsee against an acceptor, no demand was proved till three months after the bill became due, and the drawer had in the mean time become insolvent. Lord *Mansfield*

duct or language on the part of the holder which is fraudulent, or has the effect of fraud in inducing the acceptor to part with his security, or otherwise subjects himself to loss, would have the effect of waiver.<sup>(t)</sup> But receiving interest from the drawer, or from an indorser,<sup>(u)</sup> or giving time to them,<sup>(v)</sup> will not amount to a waiver, although it has been held (erroneously, we think) that giving time to the drawer, where the acceptance was known to be for the accommodation of the drawer, discharged the acceptor.<sup>(w)</sup>

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said: "The acceptor of a bill or maker of a note always remains liable. The acceptance is proof of having assets in his hands, and he ought never to part with them unless he is sure that the bill has been paid by the drawee."

(*t*) Where the holder agreed to consider an acceptance at an end, and entered in his bill-book, "A's acceptance is at an end," and no demand was made upon the acceptor for three years, it was held that the acceptance was waived. *Walpole v. Pulteney*, cited 1 Doug. 248. Where the holder took a security from the drawer, and notified the acceptor that he had settled with the drawer, and that the acceptor "need not give himself any further trouble," it was held that the acceptance was waived. *Black v. Peele*, id. But in *Adams v. Gregg*, 2 Stark 531, the accommodation acceptor desired the holder to give up the acceptance; the holder refused, but said that the acceptor should not be troubled about it. *Abbott*, C. J. thought that the declaration was no discharge. In *Wintermute v. Post*, 4 N. J. 420, *Huines*, J. said: "That a parol waiver is lawful, and will discharge the acceptor, there can be no doubt. And the court was correct in charging the jury, that if, in their opinion, the circumstances of the case and the conduct of the plaintiff induced the defendant to believe that no further resort would be had to him, it was a waiver. If the plaintiff induced the defendant fairly to suppose that he would look to the drawer, and not to him, he thereby relieved the defendant from any further care to secure funds in his hands to meet the draft, and relinquished to the defendant any liability that resulted from the acceptance. And whether he did so waive the liability of the defendant was a question of fact properly submitted to the jury." A plea of waiver must state that the party waiving was the holder of the bill at the time of the waiver. *Steele v. Harmer*, 14 M. & W. 136, 831

(*u*) *Farquhar v. Southey*, 2 Car. & P. 497, *Moody & M.* 14.

(*v*) *Dingwall v. Dunster*, 1 Doug. 247; *Ellis v. Galindo*, id. 250, note; *Farquhar v. Southey*, 2 Car. & P. 497.

(*w*) In *Laxton v. Peat*, 2 Camp. 185, an action by an indorsee against an acceptor for the accommodation of the drawer, Lord *Ellenborough* ruled that the indorsee, who had taken the bill for value, but with full knowledge of the facts, and had, without the concurrence of the acceptor, received part payment from the drawer, and given him time to pay the remainder, had thereby discharged the acceptor; on the ground that the acceptor was only a surety for the drawer. Conversely, for a like reason, in *Collett v. Haigh*, 3 Camp. 281, the same judge held that the drawer was not discharged by giving time to such an acceptor. These cases were doubted by *Gibbs*, J., in *Kerrison v. Cooke*, 3 Camp. 362, and by *Mansfield*, C. J., in *Raggett v. Axmorr*, 4 Taunt. 730. In *Fentum v. Pocock*, 5 Taunt. 192, 1 Marsh. 14, where the defendants pleaded that they accepted for the accommodation of the drawer, and that the plaintiff, who took the bill for value and without knowledge of the facts, had taken a cognovit from the drawer, against the will of the acceptors, it was held that the acceptors were not discharged, and

Whether such waiver or renunciation, however absolute, would be valid if without consideration, may be doubted. There is, or seems to be, some authority for it.(x) But it is certain

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the *Nisi Prius* rulings of Lord *Ellenborough* were denied to be law. In this last case it will be observed that the plaintiff learned the fact of the suretyship subsequently to taking the bill, but before he accepted the *cognovit*, while in the former cases the plaintiff knew the facts at the time he took the bill. But as to this Lord *Mansfield* said: "As it appears to me, if the holder had known, in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference; for he who accepts a bill, whether for value, or to serve a friend, makes himself in all events liable as acceptor, and nothing can discharge him but payment or release." *Heath and Chumbré, JJ.* concurred. In *Price v. Edmunds*, 10 B. & C. 578, *Parke, J.* said: "I think the decision in *Fentum v. Pocock* was good sense and good law." In *Yallop v. Ebers*, 1 B. & Ad. 698, Lord *Tenterden, C. J.* said, that "*Laxton v. Peat* has been long overruled." *Harrison v. Courtauld*, 3 id. 36; *Nichols v. Norris*, id. 41. See also *Carstairs v. Rolleston*, 5 Taunt. 551; *Charles v. Marsden*, 1 id. 224; *Mallet v. Thompson*, 5 Esp. 178; *Smith v. Knox*, 3 id. 46; *Angell v. Ihler*, 5 M. & W. 600, 4 Jurist, 196; *Strong v. Foster*, 17 C. B. 201. In *Ex parte Glendinning. Buck*, 517, Lord *Eldon* recognized the doctrine of *Laxton v. Peat*, 2 Camp. 185, and disapproved of *Fentum v. Pocock*, 5 Taunt. 192. See also *Bank of Ireland v. Beresford*, 6 Dow, 233; *Theobald, Principal and Surety*, p. 192, et seq.; *Jones v. Brooke*, 4 Taunt. 464.

The American cases approving the doctrine of *Fentum v. Pocock* are, *Bank of M. v. Walker*, 9 S. & R. 229; *Walker v. Bank of Montgomery Co.*, 12 id. 382; *Murray v. Judah*, 6 Cowen, 484; *Farmers', &c. Bank v. Rathbone*, 26 Vt. 19; *Clopper v. Union Bank*, 7 Harris & J. 92; *Yates v. Donaldson*, 5 Md. 389; *Hansbrough v. Gray*, 3 Gratt. 356; *Lambert v. Sandford*, 2 Blackf. 137; *Cronise v. Kellogg*, 20 Ill. 11; *Diversy v. Moor*, 22 id. 330. See also *Church v. Barlow*, 9 Pick. 547; *Commercial Bank v. Cunningham*, 24 Pick. 270; *Pickering v. Marsh*, 7 N. H. 192; *Grant v. Ellicott*, 7 Wend. 227; *Lord v. Ocean Bank*, 20 Penn. State, 384. But in *Parks v. Ingram*, 2 Foster, 283, the doctrine is laid down that an accommodation acceptor stands in the position of surety upon the bill, and the drawer in that of principal; so that a discharge of the acceptor by the holder does not release the drawer. So *Adle v. Metoyer*, 1 La. Ann. 254. See *In re Babcock*, 3 Story, 393; *Baker v. Martin*, 3 Barb. 634. It does not always distinctly appear from the cases what the true grounds for the decision were. The reason in some is, that an accommodation bill is just like any other, and in the earlier cases regrets have been expressed that accommodation bills ever came into use.

In other cases, it seems to be considered that, although the accommodation acceptor in fact may stand in the relation of surety to the drawer, yet no evidence is admissible to prove this, as it would be allowing parol testimony to contradict the written terms of the instrument. If this is so, the rules as laid down in some courts with reference to the point now under consideration would seem to conflict with the doctrine sanctioned in the same courts, with reference to admitting evidence to show where two parties sign a joint or joint and several note, without expressing on its face that one is really a surety, that the holder knew the facts at the time he took the note, and afterwards, by a valid agreement, gave time to the actual principal.

(x) The head note in *Parker v. Leigh*, 2 Stark. 228, states that the renunciation must be express, and founded upon some consideration. But the decision was, that there was no express renunciation, and therefore no discharge; and it is difficult to see how this case is an authority for saying that an express renunciation needs a considera-



that it must have full force and effect where it has induced the acceptor to do any act which would be injurious to him if the obligation were afterwards insisted on. We think that a waiver operates by estoppel rather than by contract, and we should therefore state the rule thus. Any renunciation founded upon a valid consideration, or acted upon in good faith by the acceptor, so as to put him in a worse situation than if this renunciation had not been made; or any act of the holder authorizing the acceptor to believe that the holder had renounced all claim upon him, which belief was acted upon by the acceptor, discharges him.

An acceptor for the accommodation of the drawer, by payment of the bill, acquires of course a claim against the drawer. But if a bill be indorsed for the accommodation of the drawer, and afterwards accepted, the indorser by payment acquires a claim against the acceptor as well as against the drawer; for he is not a surety for the drawer to the acceptor, but for both to the holder.(y) It has been said in one case, that, where a holder promised an acceptor that he would not sue him if he would swear that the acceptance was forged, he would not be able to hold the acceptor after such an oath, although the acceptance were not forged, and the oath was false. But this, we think, might be doubtful.(z) Any material alteration of the bill, or of

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tion to support it. The true ground, it is conceived, is, that a waiver works by way of estoppel rather than by way of contract. We should prefer to state the rule thus: An express renunciation, founded upon a consideration, or honestly and fairly acted upon by the holder, so as to put him in a worse situation than if the renunciation had not been made; or any act upon the part of the holder, giving the acceptor reasonable ground to infer that the former had renounced all claim upon him, and acted upon, — amounts to a discharge.

(y) *Weir v. Cox*, 19 Mart. La. 368.

(z) *Stevens v. Thacker, Peake*, Cas. 187. In this case, when the bill was presented to the acceptor, he declared the acceptance to be a forgery. The holder agreed not to sue the acceptor, if he would make an affidavit that he never accepted the bill; but, being afterwards convinced that the acceptor did accept, refused to receive the affidavit, and brought an action. It was contended by the defendant, that the plaintiff, having agreed to accept the defendant's affidavit as evidence that he was not the acceptor, could not afterwards recede from the agreement. But Lord *Kenyon* said: "Had the defendant sworn the affidavit, I should have held that he had discharged himself from the present action, though such affidavit had been false; for the plaintiff, who had agreed to accept that affidavit as evidence of the fact, should not, after having induced the defendant to commit the crime of perjury, maintain an action on the bill. But as in the present case the defendant had not sworn the affidavit, he still remains liable to the plaintiff's action, unless he can prove the acceptance a forgery." See *Lloyd v. Willan*, 1 Esp. 178.



the acceptance, without the assent of the acceptor, unless to correct a mistake, discharges him from liability. This subject is considered hereafter.

A discharge of the acceptor by the law of the place where the acceptance is made, and is to be performed, is equally binding everywhere. Thus, where, by the law of the country where an acceptance is made, if the drawer fails, and the acceptor has not sufficient effects of the former in his hands at the time of accepting, the acceptance becomes void, the acceptor is discharged from all liability.(a)

A cancellation by the holder, or by a third party with the holder's consent, is evidence of a waiver, and whether the cancellation in the latter case was by the consent of the holder, or not, is for the jury to determine.(b) The cancellation of an acceptance by mistake does not operate as a discharge.(c) But if the holder, aware of the mistake, causes the bill to be noted for non-acceptance, he is estopped from afterwards saying that the bill was accepted.(d)

A release before the maturity of the bill will not discharge an acceptor from liability to pay to a holder who took the bill in good faith, without notice of the release ; (e) nor will a release by the holder to the drawee discharge the latter from the obligation incurred by a subsequent acceptance, on the ground that he was not liable at the time of the release.(f) A general release by the drawer to the acceptor will, as between them, discharge the acceptor, though the drawer is not the holder of the bill, and had not then paid it.(g) Where the drawee accepted in consideration of a future consignment of goods, with the prospect of a profit on the commission for their sale, and the holder, with

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(a) *Barrows v. Jemino*, 2 Stra. 733.

(b) *Sweeting v. Halse*, 9 B. & C. 365, 4 Man. & R. 287.

(c) *Novelli v. Rossi*, 2 B. & Ad. 757 ; *Raper v. Birkbeck*, 15 East, 17 ; *Fernandey v. Glynn*, 1 Camp. 426, note ; *Wilkinson v. Johnson*, 3 B. & C. 428.

(d) *Bentinck v. Dorrien*, 6 East, 199 ; *Sproat v. Matthews*, 1 T. R. 182.

(e) *Dod v. Edwards*, 2 Car. & P. 602.

(f) *Drage v. Netter*, 1 Id. Raym. 65 ; *Hartley v. Manton*, 5 Q. B. 247. If an acceptor plead a release, the plea must set forth that the bill was accepted prior to the release. *Ashton v. Freestun*, 2 Man. & G. 1, 2 Scott, N. R. 273. In an action by the payee against the drawer, a general release to the acceptor, who had become bankrupt, and obtained his certificate, renders him a competent witness for the defendant. *Scott v. Lifford*, 1 Camp. 246.

(g) *Scott v. Lifford*, 1 Camp. 246, 9 East, 347.

knowledge of such acceptance, received and retained the bills of lading, it was held that he thereby discharged the acceptor. *(h)* If the drawee offers a conditional or partial acceptance, and the holder gives notice of non-acceptance to any prior party to the bill, without stating the nature of the acceptance offered, the drawee is not liable. *(i)*

We have already seen that compliance with the conditions of an acceptance is necessary in order to charge the acceptor, and that, when the conditions are performed, his liability immediately attaches. *(j)* Neglect, by the holder of an acceptance payable at a specified place, to present it at that place, does not now discharge the acceptor from liability, although he can prove that he has been injured by such neglect. *(k)*

If the holder receive from the acceptor another bill, indorsed by the acceptor, as satisfaction or security for the first bill, he discharges him, both as acceptor and indorser, by neglect to give him notice of the dishonor of the last bill; *(l)* but not if the last bill was given as collateral security, and not indorsed by him. *(m)*

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*(h)* *Mason v. Hunt*, 1 Doug. 297.

*(i)* *Sproat v. Matthews*, 1 T. R. 182; *Bentinck v. Dorrien*, 6 East, 199.

*(j)* *Supra*, § 3.

*(k)* *Sebag v. Abitbol*, 4 Maule & S. 462; *Turner v. Hayden*, 4 B. & C. 1, 6 Dow. & R. 7; *Rhodes v. Gent*, 5 B. & Ald. 244.

*(l)* *Bridges v. Berry*, 3 Taunt. 130. See *Kearslake v. Morgan*, 5 T. R. 513.

*(m)* *Bishop v. Rowe*, 3 Maule & S. 362. See *Hickling v. Hardey*, 7 Taunt. 312; *Goodwin v. Coates*, 1 Moody & R. 221.

## CHAPTER X.

## PRESENTMENT FOR ACCEPTANCE.

## SECTION I.

## OF THE RIGHTS AND DUTIES OF A PAYEE BEFORE ACCEPTANCE.

AFTER acceptance the payee of a bill is in much the same position as the payee of a note; but the payee of a bill not yet accepted holds an instrument which is incomplete. We will therefore first consider what he is bound to do, and what he has a right to expect in respect to acceptance.

His duty is to present the bill for acceptance to the right person, at the right time and place, and in the proper way. His right is to expect to receive an immediate, full, and unconditional acceptance. But there seems to be no principle of law by which the holder of a negotiable bill of exchange, where nothing has occurred which can be construed either as an acceptance or a binding agreement to accept, can demand acceptance; and, in case of refusal, sue the drawee. Nor would the usage of trade or custom be sufficient to give the holder the right to sue, even though the drawee have funds of the drawer in his hands, and ought in honor to accept. His refusal so to do, although without reason, and inconsistent with the principles of fair and honest dealing, does not form any good ground for the commencement of legal proceedings against him on that account.<sup>(n)</sup>

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(n) Attempts by the holder to hold the drawee liable without acceptance were made without avail in *Mandeville v. Welch*, 5 Wheat. 277, where the suit was brought in the name of the drawer; *Tiernan v. Jackson*, 5 Pet. 580; *Schimmelpennich v. Bayard*, 1 id. 264; *Luff v. Pope*, 5 Hill, 413, 7 id. 577; *N. Y. & Virginia State Bank v. Gibson*, 5 Duer, 574. In this last case *Duer, J.* said in substance: The law is well settled, that, although the refusal of the drawee to accept, who has funds in his hands which he ought to apply to the payment of the bill, may render him liable in damages to the drawer, there is no such privity between him and the holder of the bill as can entitle the latter to maintain an action against him. See also *Poydras v. Delamar*,

The reason on which it has sometimes been urged that the drawee may be liable, is that a bill of exchange operates as an equitable assignment or appropriation of the funds; and that the drawee, after having received notice of the assignment, becomes liable to the holder, and if he afterwards part with the funds, he does so at his peril. There may be some *dicta* to the effect that a bill of exchange is an assignment,<sup>(o)</sup> but no case that we are aware of, with the exception of one, has held this doctrine in an unqualified way, and that case must be considered as overruled.<sup>(p)</sup> The doctrine is well settled, that before acceptance a negotiable bill for a part of the funds is no assignment, but becomes one on the drawee's signifying his assent, by accepting the bill.<sup>(q)</sup>

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13 La. 98; *Harris v. Clark*, 3 Comst. 93. The drawee was held in *Corser v. Craig*, 1 Wash. C. C. 424. In *Luff v. Pope*, 5 Hill, 413, *Bronson*, J. said: "If the drawee refuse to accept, there is no contract between him and the holder, and no action will lie. And this is so although the drawee had funds, and ought in justice to the drawer to have paid the bill."

The language of *Story*, J., in *Mandeville v. Welch*, 5 Wheat. 277, *infra*, note *q*, — "unless an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract," — is, it is suggested, rather broader than the cases would seem to warrant. For it is supposed that the almost universal usage is for the drawee, when he has funds, to accept; and yet the fact that he has funds is not sufficient to raise any implication that any contract exists between the drawee and the holder.

(*o*) *Eyre*, C. J., in *Gibson v. Minet*, 1 H. Bl. 569, 602, said: "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer." It may be remarked, however, that it does not appear clearly whether the learned judge was referring to a bill already accepted, or to one unaccepted. But this *dictum* has been referred to as applicable to an unaccepted bill, and the same remark is to be found in other cases.

(*p*) *Corser v. Craig*, 1 Wash. C. C. 424. In this case the indorsee of a bill sued the drawee in the name of the payee and indorser, the drawee having refused to accept. Before judgment the funds were attached on trustee process, as the property of the payee and indorser. The plaintiff recovered, notwithstanding this, on the ground that the bill was an assignment of the funds. *Washington*, J. said: "If the drawee refuse to accept, the holder may sue the drawer, or the drawee in the name of the drawer, for the debt originally due, in consequence of the implied contract of the assignor of a chose in action that the debtor shall pay, and on failure, that the assignor will."

(*q*) In *Mandeville v. Welch*, 5 Wheat. 277, *Story*, J. remarked: "It is said that a bill of exchange is in theory an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true where the bill has been accepted, whether it be drawn on general funds, or a specific fund, and whether the bill be in its own nature negotiable or not; for in such cases the acceptor, by his consent, binds and appropriates the funds for the use of the payee." "But where the order is drawn on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropria-

It has been said, that, even after a conditional acceptance, the bill cannot in strictness be held to have that effect, since the drawee becomes bound by reason of the contract of acceptance, irrespective of the funds in his hands.<sup>(r)</sup> But the theory is, even in such a case, that funds to the amount of the bill have been assigned, and that the acceptor is estopped from setting up any such objection as that there were no funds to assign. Whether a negotiable bill for the whole amount of the funds can operate as an assignment, may not be clearly settled, perhaps, upon authority; but on principle it may well be doubted whether it would have this effect at law.<sup>(s)</sup> If it is an assign-

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tion by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand on the singleness of his original contract, and to decline any legal or equitable assignment by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fragments to any other persons. So that if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit." See also *Gibson v. Cooke*, 20 Pick, 15; *Poydras v. Delamare*, 13 La. 98; *Cowperthwaite v. Sheffield*, 1 Sandf. 416, 3 Comst. 243. In *Harris v. Clark*, 3 Comst. 93, *Ruggles, J.* said: If the bill "had been accepted by the drawees, it would have operated as an assignment of so much money in the hands of the drawees, and it would have afforded the plaintiff a remedy against them." And on p. 115: "It is clearly settled that no action at law will lie in favor of the holder of a bill of exchange against the drawee, unless he accepts the bill." "The research of the counsel for the plaintiff has not enabled me to find a case where it has been held that, upon a negotiable bill of exchange, the drawee has been made liable in equity to the holder of the bill without his acceptance or assent."

(r) *Hurlbut, J.*, *Cowperthwaite v. Sheffield*, 1 Sandf. 416, *infra*, note s

(s) In *Cowperthwaite v. Sheffield*, 3 Comst. 243, *Hurlbut, J.* said: "A proper bill of exchange does not of itself operate as an assignment to the payee of funds of the drawer in the hands of the drawee, and even after an unconditional acceptance it cannot in strictness be held to have that effect, since the drawee becomes bound by reason of the contract of acceptance, irrespective of the funds in his hands. He may refuse when he ought to accept by reason of his having funds, and yet neither he nor the funds would in any way be bound or affected by the bill." In the same case, reported in 1 Sandf. 416, *Vanderpoel, J.* said: "If these bills had been in the form of orders for the entire proceeds of the shipment, they might, after notice to the drawee, have operated as an assignment of such proceeds. But then they would not have possessed all the characteristics of bills of exchange. If in such form they could be negotiated, they would on their face convey information to every holder of the fund on which they were drawn, and which they carried with them." In *N. Y. & Virginia State Bank v. Gibson*, 5 Duer, 574, *Duer, J.* said: "A bill of exchange, in the proper sense of the term, never operates as an assignment of the fund against which it is drawn, and when there has been no binding

ment, the question would arise whether the holder must sue in his own name, or in that of the assignor. If in the latter, it would seem to be inconsistent with the very object and distinguishing characteristic of negotiable paper, which permits the holder to take it free from all prior unknown incumbrances, because his claim would be liable to any offset which the drawee might have against the drawer. The difficulty in allowing the suit to be brought in the name of the holder would be, that there is no privity of contract between him and the drawee. The latter has had no connection whatever with him, and there is no chance for the law of estoppel to apply, as in the case where there has been a promise to accept, although not made directly to the party seeking to avail himself of it. It has been held that a non-negotiable draft for the whole of a particular fund operates as an assignment,<sup>(t)</sup> though it is somewhat difficult to see how its operation could be such where the drawee expressly refuses to accept.<sup>(u)</sup>

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promise to accept, and no express agreement by which a trust has been created, it is only by a positive acceptance, in the form which the statute prescribes, that a right of action against the drawee can accrue to the holder." No case has been found in which a negotiable bill has been drawn for the whole amount of the fund, and the drawee has been sued on refusal to accept. But in *Gibson v. Cooke*, 20 Pick. 15, *Dewey, J.* said: "It seems also to be equally well settled, that a draft by the creditor on his debtor, in the form of a bill of exchange to the amount of the debt, or the whole fund in his hands, is a good and valid assignment of the debt or fund";—citing *Cutts v. Perkins*, 12 Mass. 209; *Crocker v. Whitney*, 10 Mass. 318; *Clarke v. Adair*, cited 4 T. R. 343; *Robbins v. Bacon*, 3 Greenl. 346. But in none of these cases did the question arise on a negotiable bill.

(t) *Cutts v. Perkins*, 12 Mass. 209; *Robbins v. Bacon*, 3 Greenl. 346. *Morton v. Naylor*, 1 Hill, 583. In *Cutts v. Perkins*, the drawee consented to the assignment by accepting. In *Robbins v. Bacon*, the language of *Story, J.*, in *Mandeville v. Welch*, 5 Wheat. 277, that "where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hands," is cited and approved. If this doctrine is correct, such a draft need never be accepted, but notice to the drawee is all that is requisite. In *Morton v. Naylor*, 1 Hill, 583, a landlord gave an order on his tenant to pay to A the rent accruing during a certain time, which the tenant, on presentment of the order, said he would do. The landlord subsequently notified the tenant not to pay, but the latter disregarded the notice and paid the order. Held, that the tenant had a right so to do, and that the landlord's claim for the rent was extinguished. In this case it will be seen that the drawee consented to the assignment, and accepted, a verbal acceptance of a non-negotiable order being valid as an acceptance, but the court in their opinion said: "The order to the tenant was an equitable assignment of the rent in question with notice to the tenant, who was bound to pay it according to the order, whether he had accepted or not."

(u) In *Williams v. Everett*, 14 East, 582, a party remitted a bill to the defendants, his

Where the draft is not negotiable, and drawn for a part of the funds, the cases are somewhat conflicting. Perhaps the weight of authority favors the rule, that the assent of the drawee is necessary; but there are cases that appear to hold that it operates as an assignment of the particular fund from the time the drawee receives notice.<sup>(v)</sup> In courts of

bankers, with directions to pay the amount of the bill, when collected, in certain specified proportions to the plaintiff and other persons, who would produce letters of advice on the subject. Before the maturity of the bill, the plaintiff notified the defendants that he had received letters from the remitter, ordering payment out of the remittance, and offered the defendants indemnity, if the defendants would indorse the bill over to him. The defendants refused to act on the letter, or to indorse the bill, but admitted that they had received directions for the application of the money. On maturity of the bill, the defendants received the amount, and the plaintiff again demanded payment. Held, that the act of receiving the bill, and subsequently collecting it, and notice of the directions, did not bind the defendants to the plaintiff, against their express dissent, to apply the money in discharge of the plaintiff's debt, and that the plaintiff could maintain no action against the defendants for money had and received to his use, for want of privity of contract, and that the property in the bill still remained in the remitter. In *Yates v. Bell*, 3 B. & Ald. 643, a bill of exchange payable at the house of A had been presented there for payment, and dishonored, and the acceptor afterwards remitted to A money to pay the dishonored bill, and also one of less value. A replied, in a letter, that he had received the money, and that it should be carried to the acceptor's account. He afterwards paid the smaller bill. It was decided that the holder of the original bill could maintain no action against A, for want of privity of contract.

(v) In *Gibson v. Cooke*, 20 Pick. 15, a person entitled to quarterly payments from a trustee drew an order on the trustee, to pay to a creditor "as the drawer's income should become due," for a sum which did not correspond precisely in amount with one or any number of the sums then due the drawer. The latter refused to accept. Held, that the order was not an assignment, and that the payee could not maintain an action against the drawee in the name of the drawer. In *Mandeville v. Welch*, 5 Wheat. 626, it is laid down, that an order for a part of a fund does not amount to an assignment. See *Robbins v. Bacon*, 3 Greenl. 346. In *Poydras v. Delamare*, 13 La. 98, the drawee refused to accept, and the order was held to be no assignment. In *Cowperthwaite v. Sheffield*, 1 Sandf. 416, *Vanderpoel, J.* said: "Where an order is drawn for a part of the fund only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft."

For cases from which it may be inferred that such a draft is a good assignment, see *Morton v. Naylor*, 1 Hill, 583, where it is said that the same rule applies at law as in equity. See *Taylor v. Bates*, 5 Cowen, 376; *Wheeler v. Wheeler*, 9 id. 34; *Pattison v. Hull*, id. 747; *Peyton v. Hallett*, 1 Caines, 363. In the last case the question arose on the point as to whether a witness in a suit, who held a draft for a part of the money sought to be recovered in that suit, was an incompetent witness on the ground of interest. *Livingston, J.*: "The order he had obtained amounted to an assignment of the property to the extent of his demand, and the agent after its exhibition to him would at his peril have parted with it to the plaintiffs, or to any other person." *Lewis, C. J.*, in a dissenting opinion, said: "The bill drawn in his favor on the agent has never been accepted, nor has the fund out of which it was to be paid ever come to his hands. The witness then, in my conception, had no interest in the fund."



equity, where the doctrine of equitable assignment was first laid down, such drafts have been held to be an assignment, even

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In the following cases accepted drafts for a part of the fund were held to be assignments. *Legro v. Staples*, 16 Maine, 252; *Johnson v. Thayer*, 17 id. 401; *Debesse v. Napier*, 1 McCord, 106; *M'Menomy v. Farrers*, 3 Johns. 71. Where the drawer had become bankrupt, and the assignee sued the drawee, but failed to recover, an order disclosed by one summoned as trustee to pay over the money in his hands, though not expressed to be for value received, is *prima facie* an assignment. *Adams v. Robinson*, 1 Pick. 461. In *Clarke v. Adair*, cited by *Buller, J.*, 4 T. R. 343, an officer drew a bill on an agent of the regiment payable out of the first money that should become due to him on account of arrears. The agent refused to accept absolutely, but said he would pay when effects came to hand. The drawer died, and his administrator brought an action to recover the money. It was allowed by all parties that this was not a bill of exchange within the custom of merchants. But Lord *Mansfield* held it to be an assignment for a valuable consideration, with notice to the agent, and that he was bound to pay it.

The question of the effect of a bill as an assignment has sometimes arisen in cases where the drawee was not interested. Thus, in *Cowperthwaite v. Sheffield*, 1 Sandf. 416, 3 Comst. 243, the consignor of a shipment of cotton drew bills on the consignee against the proceeds, and advised him thereof. The bills were presented for acceptance before the goods arrived, and acceptance was refused. The consignee afterwards received the goods, sold them, and, by a subsequent arrangement between him and the consignor, the proceeds were deposited with a third party, to be paid over to the consignor when his creditors should assent thereto, the consignor intending to apply them to the payment of the bill. The holder of the bills, who had also other demands against the consignor, got possession of the funds, which were sufficient to pay the bills, by a judicial proceeding founded on the bills and the other demands. In an action against the indorser of the bill, it was held that the bills and letter of advice did not operate as an appropriation of the proceeds to the payment of the bills, and the facts stated did not sustain a plea of payment. In *Harris v. Clark*, 3 Comst. 93, a bill of exchange was intended to be given by the drawer as a mortuary gift, and the plaintiff contended that it was valid as such, or, if not a mortuary gift, it was an assignment. The drawees had refused to accept, due notice had been given, and the holder sued the executors of the drawer. It was held that the bill was valid neither as a mortuary gift nor an assignment. See the remarks of *Ruggles, J.*, cited *supra*, p. 332, note *q*.

In *Bradley v. Root*, 5 Paige, 632, an order to pay a debt out of a particular fund belonging to the debtor was held to be an equitable assignment, *pro tanto*, and to give the creditor who received the order a specific equitable lien on the fund. In *Marine, &c. Bank v. Jauncey*, 3 Sandf. 257, 1 Barb. 486, it was held that drawing a bill on the consignee of cotton purchased with its avails does not operate as an equitable transfer of the cotton to a party who discounts the bill, or give him any lien upon the cotton or its proceeds in the hands of the consignee and acceptor; nor will a verbal understanding at the time the bill was discounted, that the proceeds should be applied to the payment of the bill, affect such lien. An order drawn upon a particular fund specified in the order by which the drawer divests himself of all control over the same, is an equitable assignment of the same, but such an order is not a bill of exchange. *Ibid.* After drawing a bill, the drawer has the same control of his funds in the hands of the drawee as he had before; and if the same funds come to his own hands, the holder has no equitable lien upon them. *Winter v. Drury*, 1 Seld. 525. The head note in this case must refer to the case where the drawee has not accepted, for it is well settled that an acceptor has a

against the will of the drawee.(w) Whether a bank-check is so far different from a negotiable bill that it may operate as an assignment, and subject a bank on which it is drawn to an action, is considered subsequently.(x) It must be noticed, how-

lien on the funds or goods for his indemnity. See this case, *infra*. In order to constitute an equitable assignment of money by means of an order, the order must direct the payment out of a particular fund, and not generally out of any money to be received. *Phillips v. Stagg*, 2 Edw. Ch. 108; *Harrison v. Williamson*, id. 430. A draft payable out of a specific sum, accepted payable out of the amount, is an equitable assignment of that amount. *Vreeland v. Blunt*, 6 Barb 182. In *Winter v. Drury*, 1 Seld. 525, it was held that an ordinary bill of exchange prior to acceptance gives the holder no lien, legal or equitable, upon the funds of the drawer in the hands of the drawee. In this case the bill was drawn for a larger amount than the funds in the possession of the drawee, and the drawer, having sold the bill, assigned all his property and absconded. The drawee refused to accept, and afterwards transmitted all the funds of the drawer to the latter by a check enclosed in a letter. The check and letter were received by the assignee of the drawer, and the check passed to the credit of the estate. The holder filed a bill in equity against the assignee to compel him to pay over the amount of the check, but the bill was dismissed.

In *Row v. Dawson*, 1 Ves. Sen. 331, a draft on a fund due out of a particular fund was held an assignment as against the assignees of the drawer. So *Yeates v. Groves*, 1 Ves. Jr. 280; *Ex parte Alderson*, 1 Mad. 53; *Watson v. Duke of Wellington*, 1 Rus. & M 602. See *Ex parte Prescott*, 3 Deac. & C. 218; *Burn v. Carvalho*, 4 Mylne & C. 690; *Fitzgerald v. Stewart*, 2 Sim. 333, 2 Rus. & M. 457; *Malcolm v. Scott*, 3 Hare, 39. Cases in which the rule is laid down that the draft on a particular fund operates as an assignment after notice to the drawee, and that the consent of the latter is immaterial, are *Row v. Dawson*, 1 Ves. Sen. 331, which was a case between the assignee of the drawer and the payee. The draft seems to have been in the hands of the drawee, and nothing appears to show that the latter dissented. But Lord Chancellor *Hardwicke* said, in his opinion: "The drawee could not have paid the money to the drawer, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment for valuable consideration." *Ex parte South*, 3 Swanst. 392, where Lord Chancellor *Eldon* said: "It has been decided in bankruptcy, that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him; on the other hand, this doctrine has been brought into doubt by some decisions in the courts of law, who require that the party receiving the order should in some way enter into a contract. *Israel v. Douglas*, 1 H. Bl. 239; *Lagh v. Lagh*, 1 B. & P. 447; *Tatlock v. Harris*, 3 T. R. 180. That has been the course of their decisions, but is certainly not the doctrine of this court." *Lett v. Morris*, 4 Sim. 607. In this case the draft was payable by instalments. The drawee paid the first instalment to the drawer, who handed it over to the plaintiff, the holder of the draft. The second instalment was paid by the drawee to the plaintiff's clerk, the drawer not being present. The drawee, on the third instalment becoming due, refused to pay. The holder then filed a bill against the drawee to compel him to pay the amount due, and he was obliged so to do. Sir *L. Shadwell*, V. C. said: "I entertain no doubt that the order amounts to an equitable assignment."

(w) See cases in note, *supra*.

(x) *Infra*, chapter on Checks.

ever, that the payee, being the holder of the bill, may, if he chooses, waive the right of presenting it for acceptance, just as he may waive the right of demanding and receiving payment, and so give up the money. And so he may delay presentment for acceptance, if he chooses to do so. If the bill be payable so many days after date, or on a day certain, he need not present it for acceptance until maturity; but it must be presented then, and the right to require acceptance may be considered as merged in the right to demand payment.(z)

It is usual, and better in such case, to present before maturity, and to ascertain whether the bill is to be accepted or not; both as respects the holder, because the name of the drawee on the bill gives it additional security, and enhances its negotiability; and as respects the drawer, that, if acceptance be refused, he may be better able to withdraw his effects from the hands of the drawee by receiving early notice of the dishonor. If the holder elects to present such a bill, he must act in case of refusal in the same way as if bound to present; (a) but this cannot affect the rights of a holder who purchases the bill before maturity, without knowledge of the refusal.(b)

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(z) *Blesard v. Hirst*, 5 Burr. 2670; *Goodall v. Dolley*, 1 T. R. 712; *Dunn v. O'Keefe*, 5 Maule & S. 282, 6 Taunt. 305, 1 Marsh. 616; *Orr v. Maginnis*, 7 East, 362; *Philpott v. Bryant*, 3 Car. & P. 244, where *Park, J.* said: "I should destroy half the trade of the city of London if I were to hold that bills made payable so many days after date must be presented for acceptance." *Bank of Washington v. Triplett*, 1 Pet. 25, where the holder's agent made an unsuccessful attempt to find the drawee, and gave no notice either to the holder or to the drawer. It was held that these facts did not discharge the drawer. *Marshall, C. J.* said: "Had the Bank taken no steps whatever to obtain an acceptance, no violation of duty would, according to the decisions, have been committed. Can an unsuccessful attempt to do what the law does not require place the agent in the same situation that he would have stood in, had the drawee been found, and had positively refused acceptance?" *Townsley v. Sumrall*, 2 Pet. 170; *Wallace v. Agry*, 4 Mason, 336, 5 id. 118; *Bachelor v. Priest*, 12 Pick. 399; *Fall River Union Bank v. Willard*, 5 Met. 216; *Oxford Bank v. Davis*, 4 Cush. 188; *Allen v. Suydam*, 20 Wend. 321, 17 id. 368; *Bank of Bennington v. Raymond*, 12 Vt. 401; *Crosby v. Morton*, 13 La. 357; *Smith v. Roach*, 7 B. Mon. 17; *Carmichael v. Bank of Pa.*, 4 How. Miss. 567; *Glasgow v. Copeland*, 8 Misso. 268. In *Chamberlyn v. Delarive*, 2 Wils. 353, a draft payable a few days after date was not presented till four months. The drawee had become insolvent. Held, that the payee had lost all claim on the drawer, whether the draft was negotiable or not.

(a) See the cases cited *supra*, note z; *U. S. v. Barker*, 4 Wash. C. C. 464. So if he elects to consider what passes on presentment as a refusal to accept. *Mitchell v. De-grand*, 1 Mason, 176.

(b) *O'Keefe v. Dunn*, 6 Taunt. 305, 5 Maule & S. 282.

If the bill be payable at so many days after sight, or demand, the payee, if he continues in possession of the bill, is then under an obligation to the drawer and to the prior parties, if there be any, to present it within a reasonable time, in order that the days may begin at the expiration of which the bill is mature.(c) The payee has a reasonable time within which to put the bill into circulation, and so has each successive holder for value.(d) Bills payable on demand or at sight are not presented for acceptance, in this respect being like promissory notes, and the same is true in general with regard to checks; but there is a custom, as we shall see, for banks to certify that checks drawn upon them by customers are good, the effect of which is equivalent to the acceptance of a bill.(e) It has been held that presentment to the drawee is necessary, even though the drawer has requested him not to accept.(f) The holder is not bound to present again,

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(c) See the cases cited *supra*, p. 337, note z; *Muilman v. D'Eguino*, 2 H. Bl. 565, where *Eyre, C. J.* said: "The courts have been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance, and it seems to me more necessary to be cautious with respect to a foreign bill payable in that manner. If, instead of drawing their foreign bills payable at usances, in the old way, merchants choose for their own convenience to draw them in this manner, and to make the time commence when the holder pleases, I do not see how the court can lay down any precise rules on the subject. I think, indeed, that the holder is bound to present the bill in reasonable time, in order that the period may commence from which the payment is to take place." *Goupy v. Harden*, 7 Taunt. 159, Holt, 342; *Fry v. Hill*, 7 Taunt. 397; *Mellish v. Rawdon*, 9 Bing. 416, 2 Moore & S. 570; *Mullick v. Radakissen*, 9 Moore, P. C. 66, 28 Eng. L. & Eq. 86; *Robinson v. Ames*, 20 Johns. 146; *Aymar v. Beers*, 7 Cowen, 705; *Prescott Bank v. Caverly*, 7 Gray, 217; *Fernandez v. Lewis*, 1 McCord, 322. In *Dumont v. Pope*, 7 Blackf. 367, no time for payment was specified. Presentment for acceptance in a reasonable time was held necessary. In *Elting v. Brinkerhoff*, 2 Hall, 459, a non-negotiable order to "pay to A one hundred dollars," was not presented till nearly six years from date. Held, that if this was an inland bill, the drawer was discharged by the laches of the holder; if a check, presentment for payment at any time before the lapse of six years was sufficient, unless the drawer could prove injury.

(d) See *infra*. *Tindal, C. J.*, *Mellish v. Rawdon*, 9 Bing. 416, 427.

(e) See *infra*, chapter on Checks.

(f) *Hill v. Heap, Dow. & R.*, N. P. 57. *Sed quære*. In *Prideaux v. Collier*, 2 Stark. 57, the holder presented a bill the day before maturity. The drawee refused to accept, having no funds, but remarked that the bill would not be due till the next day, and that the drawer would probably put him in funds. On the day of maturity, the drawer told the plaintiff that he hoped the bill would be paid, and that he would endeavor to provide funds, and would see him again. The bill was presented to the drawees the day after maturity. Held, in an action by the holder against the drawer, that presentment at maturity was still necessary, and the plaintiffs were nonsuited. These cases would seem hardly to be supported by reason. It will be seen

after refusal to accept and notice given, even though the drawer requests him to do so, and promises that the bill shall be honored.<sup>(g)</sup>

With regard to the necessity of presentment for acceptance where the drawee has died, removed, absconded, or become in any way incompetent to enter into a contract, most of the cases have been decided with reference to presentment for payment; but there seems to be no good reason why the same principles should not be applicable to both classes of cases.<sup>(h)</sup>

As to the person who is to make the presentment, it should be, in general, the lawful holder or his agent; but we have already seen that a written acceptance is binding without any reference to the party making the request. If, however, the acceptance is oral, it must be made to one then having an interest in the bill, or subsequently acquiring an interest on the credit of the words so spoken.<sup>(i)</sup>

We have already stated that bills payable at a certain number of days after sight or demand must be presented within a reasonable time; and it now becomes necessary to see what is meant by this reasonable time. It does not seem clear from the authorities whether this question of reasonable time is one for the court or the jury. Some of the cases appear to hold that it is a question for the jury, some decide that it is a mixed question of law and fact, and others that it is a question of law for the court.<sup>(j)</sup> Our

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subsequently, that, where the drawer knew that the drawee had no funds, the former is not entitled to notice of dishonor, on the ground that drawing the bill under such circumstances is a fraud. How then can it be said that he is entitled to have a useless presentment made, when he has no right to require notice of it? In the latter case, it does not distinctly appear that the drawees had no funds, but it is fairly to be inferred from the case. Besides, if there was reasonable ground for the plaintiff to rely upon the declarations of the drawer, it hardly seems just that the latter could object to want of presentment.

(g) *Hickling v. Hardey*, 7 Taunt. 312, 1 J. B. Moore, 81.

(h) See Chap. 11. If the drawee of a bill cannot be found at the place where the bill states him to reside, and it appears that he never resided there, or has absconded, the bill is to be considered as dishonored. *Wolfe v. Jewett*, 10 La. 383.

(i) *Supra*, c. 9, § 1, p. 286.

(j) In *Muilman v. D'Eguino*, 2 H. Bl. 565, *Eyre*, C. J. said: "The question, what is reasonableness of time, must depend on the particular circumstances of the case, and it must always be for the jury to determine whether any laches is imputable to the plaintiff" *Buller*, J. said: "The question is, whether due diligence was used by the plaintiffs in this case. Upon all the facts, the jury have found that there were no laches in the plaintiff and there is nothing in the state of those facts, as they appear upon the evidence, to warrant the court to say that the verdict is against law." In *Fry v. Hill*, 7

own view, derived from the authorities cited in the note, and from the reason of the case, is this. Where the facts are few and simple, and the acts or admissions of parties clear and unequivocal, the question is one of law for the court. But where the rights and liabilities of parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine. It may, perhaps, be regretted that this

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Taunt. 397, *Gibbs*, C. J. said: "If we were to grant a new trial, the result would come at the last to this; it would be a question for the jury whether there has been a default to present the bill within a reasonable time. That question has already been left to the jury, and they have found that the bill was presented in a reasonable time. We think, as the matter stands, it is perfectly right." *Goupy v. Harden*, 7 Taunt. 159. In *Wallace v. Agry*, 4 Mason, 336, *Story*, J. said: "What that reasonable time is, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court. Such, as I take it, is the doctrine of the authorities." In *Fernandez v. Lewis*, 1 McCord, 322, *Gantt*, J. said: "What is reasonable time depends upon the particular circumstances of the case, and it is for the jury to determine whether any laches is imputable to the holder . . . . The verdict of the jury was legally correct, and cannot now be disturbed." In *Shute v. Robins*, *Moody & M.* 133, 3 Car. & P. 80, Lord *Tenterden*, C. J. said: "The only question in this case is, whether the plaintiffs or their servant used due diligence in forwarding the bill in question. This is a mixed question of law and fact; and, in expressing my own opinion, I do not wish at all to withdraw the case from the jury." In *Mellish v. Rawdon*, 9 Bing. 416, 2 Moore & S. 570, *Tindal*, C. J. said: "Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case. The judgment of the Court of Common Pleas in *Muilman v. D'Eguino*, 2 H. Bl. 565, seems to us to lead directly to this conclusion, and to no other." *Straker v. Graham*, 4 M. & W. 721; *Mullick v. Radakissen*, 9 Moore, P. C. 66, 28 Eng. L. & Eq. 86. In *Prescott Bank v. Caverly*, 7 Gray, 217, *Bigelow*, J. stated the rule as follows: "Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not."

In *Aymar v. Beers*, 7 Cowen, 705, the defendant sought to excuse delay in presenting, on account of the sickness of the payee. The court below rejected the evidence, and ordered a nonsuit, though the defendant insisted on his right to go to the jury, upon the question. The court above held, that although the reasonableness of time was a question of law for the court, yet that sickness was an excuse, and ordered a new trial. The cases on negotiable paper cited in support of the doctrine, however, arose with regard to the reasonableness of time in giving notice, and not in respect to presentment for acceptance. See *Elting v. Brinkerhoff*, 2 Hall, 459.



question of reasonable time is not made certain in England and in this country by law, as it is in France.<sup>(k)</sup> Many cases have arisen upon this point, but as each one was decided on its own peculiar circumstances, they do not go very far towards establishing a general rule.<sup>(l)</sup>

One element which has an important bearing on the subject of the reasonableness of delay, is the fact that the bill has been circulated. A holder may put the bill into circulation without presenting it for acceptance, and while the bill continues in circulation, a considerable delay, even of a year or more, may not be laches; yet if the holder were to take the bill up from circulation, a short delay would then be laches,<sup>(m)</sup> although this does not mean that he must instantly upon coming into possession of the bill elect either to present or circulate it.<sup>(n)</sup>

If a bill payable abroad after sight be received in business, it is not necessary to send it abroad by the first opportunity, nor need any bill payable after sight be sent directly to the place on which it is drawn,<sup>(o)</sup> though a holder would hardly

(k) Code de Commerce, L. 1, T. 8, a. 160; 1 Pardes. 434, 435, 2 id. 391. The holder is bound to allow the drawee one day for every fifteen miles between the place where the bill is drawn and that on which it is drawn, that the drawee may receive advice. 1 Pardes. 382.

(l) See the cases cited *supra*, p. 339, note j.

(m) In *Muilman v. D'Eguino*, 2 H. Bl. 565, *Buller, J.* said: "But here I must observe, that I think a rule may thus far be laid down as to laches, with regard to bills payable at sight, or a certain time after sight; namely, that they ought to be put into circulation. If they are circulated, the parties are known to the world, and their credit is looked to; and if a bill drawn at three days' sight were kept out in that way for a year, I cannot say there would be laches. But if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches." *Wallace v. Agry*, 4 Mason, 336, 5 id. 118.

(n) In *Mellish v. Rawdon*, 9 Bing. 416, *Tindal, C. J.*, after quoting the language of *Buller, J.*, *supra*, note m, said: "The meaning, therefore, of the expression above referred to is, and indeed the very form of the expression denotes it, that he must not lock the bill up for an indefinite time; that there must be some limit to its being kept from circulation; and what limit can there be, except that the time during which it is locked up must be reasonable? But what is or is not reasonable for that purpose, a jury must, with the assistance of the judge, under all the circumstances of the particular case, determine."

(o) It was contended by the defendant in *Muilman v. D'Eguino*, 2 H. Bl. 565, that the bills which were drawn in London on Calcutta ought to have been forwarded by the first ship that left after the indorsement of the bill to the plaintiffs, but the objection was not sustained. In *Wallace v. Agry*, 4 Mason, 336, 5 id. 118, the bill was drawn in Havana on London. *Story, J.* said: "It has been said that the plaintiff was bound to send it (the bill) directly from Havana to England by some regular con-



be justified in sending the bill to a remote place, wholly out of the course of trade.(p) But a bill drawn in Havana on London may be forwarded by the way of the United States;(q) one drawn in London on Lisbon, by the way of Paris and Genoa;(r) and one drawn in New Orleans on Liverpool, by the way of New York.(s) The custom and usage of trade will of course have an important bearing on the question of delay.(t) Also the distance between the place where the bill is drawn, and the residence of the drawee. The falling or rising of the rate of exchange may likewise be considered,(u) the holder having a right

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veyance, and had no right to remit it to Boston for sale. I am of a different opinion. The party who receives a negotiable bill payable after sight has a right to sell it in the market where he resides, or to send it to any other place for sale. He is not bound personally to make a remittance of it, or to send it directly to the country on which it is drawn. He is at full liberty to put it in circulation, or to send it to any other place for sale or remittance; and the only limitation upon this right is, that he shall have it presented within a reasonable time, be the conveyance direct or indirect. To be sure, the usage of trade is to be consulted on this, as on other occasions. The holder of such a bill is not at liberty to send it to very remote places, wholly out of the course of trade, if there be unreasonable delay thereby in the presentment for acceptance; and thus to fix the drawer with an indefinite responsibility. But, on the other hand, the transmission in a direct trade is not necessary. No one can doubt that, by the course of trade, many bills of exchange drawn in Havana on England are sent to the United States for remittance or sale. The very testimony in this case establishes this fact. It would be a most inconvenient rule to hold that such a negotiation of bills was at the sole peril of the holder. I know of no rule of law reaching to such extent. In my judgment, the remittance of the bill to Boston for sale was not a discharge of the defendants."

(p) *Story, J., Wallace v. Agry, supra, note o.*

(q) *Wallace v. Agry, 4 Mason, 336, 5 id. 118.*

(r) *Goupy v. Harden, 7 Taunt 159.*

(s) *Bolton v. Harrod, 9 Mart. La. 326.*

(t) *Wallace v. Agry, 4 Mason, 336* In this case, reported 5 *Mason, 118, Story, J* said: "The evidence in the case of the usage of merchants, if not good evidence of the law, was evidence as to their understanding of what was reasonable time, and in that view proper for the consideration of the jury; that with reference to such usage he would put it to the jury to say whether the present bill was not, in point of fact, put into negotiation, or transmitted for presentment, within a reasonable time." *Shute v. Robins, Moody & M. 133, 3 Car. & P. 80; Prescott Bank v. Caverly, 7 Gray. 217.*

(u) The falling of the rate of exchange was an excuse offered for delay in *Wallace v. Agry, 4 Mason, 336, 5 id. 118; Mellish v. Rawdon, 9 Bing 416, 2 Moore & S. 570.* In this last case *Tindal, C. J.* said: "So long as the exchange remains steady, or at all events, if it rises after he (the holder) has taken the bill, his interest does not materially clash with that of the drawer; and on such a case the jury would probably think, with reference to the interest of both, that the reasonable time for sending forward the bill was satisfied by the allowance of a shorter and less extended period of time than if the interest of the holder and the drawer were in conflict and competition with each other."

to delay where there is a reasonable ground for supposing that the exchange may become more beneficial to him.(v)

The means and facility of communication between the places should be considered, where the party who presents the bill has had it in his possession for some length of time; (w) so also the fact that war exists between the two countries.(x) A delay otherwise unreasonable would be excused by inevitable accident, or invincible obstruction, as by severe illness.(y) Whether the fact that the bill has passed through several hands may not have some effect in gradually shortening the reasonable time to which each successive holder is entitled, does not appear to have been considered; but it has been held that, in determining the point of reasonable time, the jury are to look at the interests of the drawer, as well as those of the holder,(z) and it would seem that

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But if, as happened in the present case, the exchange falls immediately after the sale of the bill, the jury might then think a more extended period might fairly and reasonably be allowed the holder, in order to enable him, *bona fide*, to endeavor to make a fair profit, or, at all events, to endeavor to secure himself from actual loss."

(v) *Mullick v. Radakissen*, 9 Moore, P. C. 66, 28 Eng. L. & Eq. 86, limits the right of the holder to wait for a more favorable rate of exchange to cases where he has reasonable ground to expect it soon. The bill in this case was drawn in Calcutta on Hong Kong. Parke, B. said: The court "thought that the evidence proved that, for the whole of the time, a period of more than five months, bills on China were altogether unsalable in Calcutta; that such was the permanent and regular state of the market: and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had a right, with a view to his own interests, to keep the bill for some time, he had no such right when there was no hope of the amendment of that state of things; and we are of opinion that the evidence fully justified this conclusion from it, and that the court, deciding on facts, as a jury, were perfectly right."

(w) See *Straker v. Graham*, 4 M. & W. 721; *Shute v. Robins*, Moody & M. 133, 3 Car. & P. 80; *Dumont v. Pope*, 7 Blackf. 367.

(x) *U. S. v. Barker*, 1 Paine, C. C. 156, 163, where *Livingston*, J. said: "When it is considered that the bill was drawn in time of war, which renders any intercourse precarious and not of very frequent occurrence, it would be too much for any court to say that the delay here complained of shall destroy the right of the plaintiffs to recover on this bill."

(y) In *Aymar v. Beers*, 7 Cowen, 705, the plaintiff offered evidence of sickness to excuse delay. The court below rejected it as not sufficient, and nonsuited the plaintiff. The court above set aside the nonsuit on that account.

(z) In *Mellish v. Rawdon*, 9 Bing. 416, *Tindal*, C. J. said: "The point which arises in this case is whether, in determining the question of reasonable time, the jury are to look exclusively to the interests of the drawer, or may take into account those of the holder also. And we are of opinion, there is no rule of law, and no custom was proved at the trial, which should prevent the jury from looking, for that purpose, to the interests of both." *Mullick v. Radakissen*, 9 Moore, P. C. 46, 28 Eng. L. & Eq. 86.

there should be some limit to the question, independently of the Statute of Limitations. The continued solvency of the drawee, and the want of proof of actual loss by laches, have been held to be no answer to the objection of delay in presentment.(a) The law is different with respect to bank-checks, which subject is considered subsequently.(b) As may be supposed from the almost infinitely varying change of circumstances in each case, the actual lapse of time in the cases varies considerably.(c) And,

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(a) *Mullick v Radakissen*, 9 Moore, P. C. 46, 68, 28 Eng. L. & Eq. 86, where *Purke*, B. said: "It remains to consider only one point, which was insisted upon in the court below, and also argued at the bar before us; namely, that, as the drawers remained perfectly solvent from the date of the bill to the present time, the rule as to presenting in a reasonable time did not apply, and that there was no laches which would constitute a defence by the drawers unless they had incurred a loss by that laches. The court below decided that the solvency of the drawers, and the want of actual loss by laches, constituted no answer to the objection of laches. We think they were right. There is no trace of such a qualification in the elaborate judgment of *Tindal*, C. J. in *Mellish v. Rawdon*, (9 Bing. 416,) in which the circumstances which constitute a reasonable delay are fully discussed. No mention is made of the insolvency of the drawer subsequent to the drawing, although it did occur in that case, or some loss by the drawer being an essential condition to the application of the rule laid down; and in *Muilman v. D'Eguino*, 2 H. Bl. 565, it was clear that the failure of the drawer caused no damage to the plaintiff, being before the time that the bill could possibly have been presented in India; yet that circumstance was not mentioned as dispensing with the obligation to present in a reasonable time; and with respect to all bills of exchange payable after date, it is fully settled that neither the want of presentment at the time the bill is due, nor the want of due notice, are excused because the drawer has continued solvent, or the holder incurred no loss by non-presentment or want of regular notice. This point was fully considered in the case of *Carter v. Flower*, 16 M & W. 743, and we believe admits of no doubt; and we agree with the court below, that the continued solvency of the drawers does not prevent the application of the rule that the bill must be presented in a reasonable time, with reference to the interest of the drawer to put the bill into circulation, or the interest of the drawee to have the bill speedily presented."

(b) *Infra*, chapter on Checks.

(c) In *Muilman v. D'Eguino*, 2 H. Bl. 565, bills drawn in London on Calcutta, at ninety days, were circulated in England for seventy-eight days, then forwarded to Calcutta. The ship in which they were carried arrived in the Hooghly River, Oct. 3, seven months after the date of the bills. On Oct. 5, the holder notified the drawee, who was absent from Calcutta, and the latter refused to accept, by letter, Oct. 17. The bills were protested, Oct. 29. Held, no laches. In *Goupy v. Harden*, 7 Taunt. 159. the bill was drawn in London on Lisbon at thirty days, circulated through Paris and Genoa, and presented, after a delay of three months and ten days. Held, no laches, in an action by indorsees against their indorsers. In *Fry v. Hill*, 7 Taunt. 397, a bill drawn in Windsor on London, at one month, was presented after a delay of four days, Sunday intervening. Held, no laches. In *Shute v. Robins*, Moody & M. 133, 3 Car. & P. 80, a bill drawn in Plymouth on London, at twenty days' sight, was not presented till nine days. Held, in an action by indorsees against indorsers, that there were no laches

whatever the reasonable time may be, the holder who exceeds it discharges all prior parties, because he takes upon himself the risk both of the drawee's non-acceptance and of his insolvency.

It has been held that an agent is bound to present immediately,

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In *Mellish v. Rawdon*, a bill drawn in England on Rio de Janeiro, at sixty days, was kept by the holder nearly five months, the rate of exchange having fallen. Held, no laches, in an action by the holder against the drawer. In *Straker v. Graham*, 4 M. & W. 721, a bill drawn in Carbonear, Newfoundland, on Poole, England, at ninety days, was not presented till three months after date. Carbonear is twenty miles from St. John's, with a daily means of communication between the places. The mails were sent from St. John's to England three times a week, and the average length of the voyage being eighteen days. Held, that the bill was not presented within a reasonable time, no excuse being shown for the delay. In *Mullick v. Radakissen*, 9 Moore, P. C. 46, 28 Eng L. & Eq. 86, A drew a bill in Calcutta on B of Hong Kong, at sixty days' sight, and indorsed it to C. C kept the bill five months, and indorsed it to D. D kept the bill from July 25th till Sept. 7th, and then forwarded it to Hong Kong. It was presented for acceptance, October 24, eight months after date, and acceptance was refused. The ordinary length of the voyage between the two places is one month. The bill was protested, November 28. D sued A, the drawer, who defended on the ground of unreasonable delay. Held, that he was not entitled to recover. This case is therefore an authority to show that the laches of a prior holder in circulating a bill is a good defence for the drawer as against a subsequent holder.

In *Wallace v. Agry*, 4 Mason, 336, the defendant's agent drew a bill at sixty days in Havana on London. The plaintiff sent the bill to his agent in Boston, who kept it, on account of the low rate of exchange, for eighty-four days, and then sent it to London, where it was presented four and a half months after date. On the first trial, the jury disagreed on the facts, but on the second, 5 Mason, 118, found for the plaintiff. In *Robinson v. Ames*, 20 Johns. 146, a bill at sixty days was drawn in Augusta, Ga., on New York, and circulated, and presented in two and a half months from date. Held, in an action by an indorsee against the drawers, no laches. In *Gowan v. Jackson*, 20 Johns. 176, the bill was drawn in Antigua on London, at ninety days, and circulated. A delay of six months had occurred. A packet usually left Antigua for London once a month. Held, in an action by the indorsees against the drawers, no laches.

In *Aymar v. Beers*, 7 Cowen, 705, a bill drawn in New York on Richmond, Va., at three days, was presented after a lapse of about a month. *Woodworth, J.* was inclined to think that there might be laches, but the case was decided on the point that sickness was a good excuse for the delay, in an action by indorsees against the drawer. In *Prescott Bank v. Caverly*, 7 Gray, 217, presentment in Boston during banking hours on Wednesday of a bill at sight, indorsed to the holder in Lowell after banking hours the previous Saturday, and forwarded by the holder to Boston on Tuesday, was held sufficient to charge an indorser. In *Fernandez v. Lewis*, 1 McCord, 322, a bill drawn in Charleston on New York, at three days, was not presented for two and a half months. The holder lived several days in the same house with the drawee. Held, that the drawer was discharged by the delay. In *Dumont v. Pope*, 7 Blackf. 367, one month's delay was held too much, the distance between the place where the bill was drawn and that on which it was drawn being only eighteen miles, with a communication three times a week between the places. In *Bolton v. Harrod*, 9

or as soon as he can by ordinary means, a bill which is forwarded to him to obtain acceptance; and that, if he fails so to do, he is liable to his principal for any loss that may ensue in consequence of the delay in presenting.(d)

It will be seen hereafter, that no presentment for payment need be made on any day set apart either as sacred, or otherwise, by law or usage; and that it must be made within reasonable hours, which may vary with the place; thus, if at a bank, then during banking hours; if at a place of business, then during business

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Mart. La. 326, a bill drawn in New York on Liverpool, at thirty days, was sent by the way of New York. A delay of two and a half months was held no laches. In *U. S. v. Barker*, 1 Paine, C. C. 156, a bill drawn in the United States on Liverpool was presented three months from the date. War existed between the United States and England. Held no laches.

(d) In *Allen v. Suydam*, 17 Wend. 368, the principal received a draft dated July 21st, payable to his order, two months after date, on August 16th, and he placed it in the hands of an agent for collection the same day. The agent forwarded the draft Sept. 2d, and on Sept. 7th it was presented to the drawees, who refused to accept, saying that they never accepted for the drawer without instructions, but expected to hear from him in a short time. On Sept. 10th, the draft was again presented, and the drawees refused to accept, because the drawer had instructed them to do so. It appeared that, subsequent to the drawing of this bill, other bills of the same drawer had been accepted and paid by the same drawees; that at the date of the bill the drawees had funds of the drawer in their hands, but none at the time of presentment, and that the principal gave the agent no special instructions with regard to presentment. A verdict was directed for the plaintiffs, and sustained. The justice of this case, at least, is very doubtful. It will be seen that the bill, being payable at a certain time after date, need not have been presented for acceptance by the holder at all, but the agent presented it nine days before maturity, after having kept it in his hands seventeen days. He had no instructions from the principal to present it immediately, and it is very difficult to see why the agent was required to do more than the principal was bound to do. It also appeared in the case, that the lateness of presentment had nothing whatever to do with the refusal, and that, if the agent had presented the very day he received it, it would not have been accepted, nor was there any time between the date of the bill and its maturity when the drawees would have accepted. Why, then, must an agent be required to make an utterly useless presentment, when any holder, in the exercise of reasonable diligence, would not be required to present, even if there was a fair prospect of acceptance? The case was affirmed, however, 20 Wend. 321, on this point. The reasons given are not satisfactory. The opinions of various writers are cited, and the reasons, so far as they can be collected, are, that the holder has an interest in having the bill accepted as soon as possible, and therefore his agent is bound to present immediately. But it is no negligence for the principal not to present, and it can hardly be said to follow that this would be negligence in the agent. And if it is so much for the interest of the principal to obtain acceptance, is he not guilty of negligence in not giving the agent special instructions to do so, which the agent would be bound to follow. It is said, "that, even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent." This reason cannot apply here, for the facts do not show negligence at all. We suppose the real reason for the decision

hours, or when some one is present who is authorized to accept or refuse; if at a dwelling-house, then while the family are up, and not in the hours when they have retired.<sup>(e)</sup> We are not aware that there are more than a very few decisions on these points, with respect to presentment for acceptance; <sup>(f)</sup> but it is conceived that the same principles are applicable to this and to presentment for demand. It has already been remarked, that the holder should have the bill with him when he asks for acceptance. If he does not produce it, and the drawee is willing to

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was the authority of *Bank of Scotland v. Hamilton*, 1 Bell, Comm. 320, and *Van Wart v. Woolley*, 5 Dow. & R. 374. In *Bank of Scotland v. Hamilton*, 1 Bell, Comm. 320, note 2, 4th ed., the plaintiff sent a bill to his agent to collect. It was proved that it was not customary to present such bills for acceptance, but only for payment. The agent did not present it till maturity. Between the day of drawing and maturity the drawee failed. It did not appear that the bill would have been accepted if it had been presented immediately. It was held that the defendant was bound. This case cannot be regarded as an authority. It was decided in the Court of Session in Scotland, and the bare facts are mentioned in the note to Bell's Commentaries, without any reasons. In *Van Wart v. Woolley*, 3 B. & C. 439, 5 Dow. & R. 374, the agent neglected to give his principal notice of the non-acceptance of the bill. It appeared that the drawee had no funds of the drawer, and consequently the latter was not entitled to notice; that the principal had received the bill from a party who did not indorse it, and that this party was liable without notice. The suit was brought by the principal against the agent. At the time of the suit it was not certain that the plaintiff had not lost his remedy against the party from whom he received it, on account of want of notice. All that is said by the court, *Abbott, C. J.*, with regard to the liability of the agent is: "Upon this state of facts it is evident that the defendants have been guilty of a neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is therefore entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect." This, it would seem, is assuming the very fact in dispute, which is, that the agent was guilty of neglect in not giving the principal notice, when notice would have availed him nothing, and when the principal, if he had himself presented, could not have been required to have sent notice to any party. No authority is cited, nor is any reason given; and the doctrine is laid down that an agent is bound to use greater diligence in presenting a bill for acceptance, than if he himself were the owner and holder of the bill. The hardship of these cases is mitigated, however, by the amount of damages which the principal is allowed to recover. In *Allen v. Suydam*, 17 Wend. 368, the judge at Nisi Prius instructed the jury, on the facts of the case, to return a verdict for the whole amount of the bill. This was affirmed in the Supreme Court, but was reversed in the Court of Errors, 20 Wend. 321, where it was held that, although the measure of damages is, *prima facie*, the amount of the bill, yet the defendant may show circumstances in mitigation thereof. Senator *Verplanck* dissenting. In a subsequent trial of *Van Wart v. Woolley*, *Moody & M.* 520, the principal, having recovered the full amount of the bill from the party from whom he had received it, was allowed to recover nominal damages only.

(e) *Infra*, chap. 11.

(f) *Nelson v. Fotherall*, 7 Leigh, 179, is the only one which we have met with.



accept in the usual way, by writing his name on the face, but declines accepting otherwise, or without seeing the bill, he cannot be charged with the penalties of non-acceptance; but if the drawee makes no such objection, and does or says what is the equivalent of acceptance, he cannot afterwards refuse to be held on the ground that he did not see the bill.(g)

A drawee may demand a delay of twenty-four hours, during which he may inspect his accounts with the drawer, and determine whether to accept the bill or refuse acceptance, and during this time the bill may be left with him.(h) As soon, however, as he accepts or refuses, although within the time, the holder should withdraw the bill. If the drawee delays acceptance more than twenty-four hours, the holder may treat this as a refusal to accept, and must indeed do so to hold the other parties.(i) It has been held, where the holder by his negligence or fault enables a third party to get possession of a bill which he had left with the drawee for acceptance, and which had subsequently been accepted, that the drawee is not liable in trover for the bill to the holder.(j)

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(g) *Supra*, chap. 9. In *Fall River Union Bank v. Willard*, 5 Met. 216, it was held that, where the holder merely informs the drawee that he has the bill, and the latter tells him that it will not be accepted nor paid, the indorser is not thereby discharged, if no notice is given of the drawee's declaration. *Hubbard, J.* said: "The term presentment imports, not a mere notice of the existence of a draft which the party has in his possession, but the exhibiting of it to the person on whom it is drawn, that he may see the same and examine his accounts or correspondence, and judge what he shall do, — whether he shall accept the draft or not. Here there appears to have been nothing more than a casual meeting of the parties, and the conversation on the subject of the draft ensued." In *Carmichael v. Bank of Pa.*, 4 How. Miss. 567, *Sharkey, C. J.* said: "Anything which amounts to a notification of the holding of the bill, with a request to accept, accompanied by the bill, will amount to a presentment. No formal presentment is necessary, or rather there is no form for a presentment. The bill explains itself, and the object is understood in the mercantile community, when it is shown and an answer required."

(h) *Ingram v. Forster*, 2 J. P. Smith, 242. In *Bellasis v. Hester*, 1 Ld. Raym. 280, *Treby, C. J.* said: "The party may have the whole day to view the bill, and that is allowed him by the law." See *Hubbard, J.*, *Fall River Union Bank v. Willard*, *supra*, note g.

(i) See *Ingram v. Forster*, 2 J. P. Smith, 242.

(j) *Morrison v. Buchanan*, 6 Car. & P. 18. In this case the plaintiffs' clerk left the bill with the drawee for acceptance, and, subsequently calling for it, found that it had been accepted and delivered to another person. The plaintiffs sued the drawee for the bill. In defence, it was proved by the drawee that it was his custom to deliver accepted bills to the party calling for and accurately describing them; that the bill in suit had a private mark upon it, and was delivered to a person who, on being asked, gave the



The bill should be presented for acceptance either to the drawee in person, or to some one authorized by him to receive and accept. (k) As the holder must prove presentment in case he founds any right or claim on non-acceptance, the burden lies on him, if he presents it to an agent of the drawee, to prove that the agent was authorized to accept. But this proof may undoubtedly, as in other cases of agency, be circumstantial or indirect; as, for example, that he was the clerk of the drawee, known to be accustomed to do this kind of business for the drawee.

We have already seen, that an acceptance by one of two or more partners binds the firm. (l) Therefore, if a bill is drawn on partners, it may be presented to one alone. If it is drawn on two or more who are not partners, it should be presented to all; but if presented to a part, or if presented to all and refused by a part, the acceptance will bind such as make it.

With regard to the place where presentment should be made, we refer to the chapter on Presentment for Demand, where the

right mark, amount, &c. Two days had elapsed between the time when the bill was left and the time when it was called for. *Littledale, J.*, in summing up, said to the jury: "The questions for you will be: first, whether there was any negligence on the part of the plaintiffs in their conduct with respect to the bill; and, secondly, whether there was negligence on the part of the defendant. If you are of opinion that there was negligence on the part of the plaintiffs, then they will not be entitled to recover; but if the negligence was on the part of the defendant, then the plaintiffs will be entitled to the verdict. If there was not any negligence on the part of either plaintiffs or defendant, then the matter may be reserved for further consideration; as it is admitted to be a doubtful point of law. As to the first point, you will consider whether the plaintiffs' witnesses were the cause of the finding out of the private mark. . . . If he (the plaintiffs' clerk), by his improper act, enabled a person to ascertain the private mark, and thereby to procure the bill to be delivered out according to the usual course of business, then it will be for you to say whether you do or do not consider that as negligence. The question as to the defendant is, Has he been guilty of that kind of negligence which amounts to a conversion of the bill?" The jury found negligence in the plaintiffs' clerk, and that the defendant had used due caution. Verdict for the defendant.

(k) *Check v. Roper*, 5 Esp. 175. This was a suit against a drawer. To prove presentment, it was shown that the bill was sent by the witness, who carried it to a place pointed out to him as the drawee's house, and offered it to some one in an adjoining tan-yard, who refused to accept. The witness could not swear that the person to whom he offered the bill was the drawee, or represented himself as such. Lord *Ellenborough* said, that the allegation of presentment for acceptance to the drawee "was a material one, as the drawer could only become liable on the acceptor's default, which default must be proved. That the evidence here offered proved no demand on the drawee, and was therefore insufficient, so that the plaintiff could not recover on the bill. Some evidence must be given of an application to the party first liable."

(l) *Supra*, p. 135.

subject is treated of at length. We may here, however, state, that if a bill be presented at the proper place, whether this be designated on the bill, or otherwise determined, and no one appears to accept it, it should be duly protested for non-acceptance, and notice be given. And if the drawee cannot be found at the place specified in the bill, and it appears that he never resided there, the bill is then also to be considered and treated as dishonored.(m)

## SECTION II.

### PROCEEDINGS ON NON-ACCEPTANCE.

WHAT the holder should do in case of non-acceptance or a refusal to accept, is much the same with the conduct which the holder of a bill should pursue in case of non-payment. The rule, in general, is, that a foreign bill should be protested for non-acceptance, and due notice given to the prior parties; otherwise the holder will lose all remedy, both on the bill and the consideration for which it was given. It is customary, but not necessary, to protest inland bills. For a further consideration of this subject, reference may be made to the chapters on Presentment for Demand,(n) on Notice,(o) and on Protest.(p) The peculiarities with respect to bills of exchange, as regards acceptance for honor, better security, or by a drawee *au besoin*, have already been considered.(q) The holder, after due protest for and notice of non-acceptance, is entitled to sue the drawer immediately, without waiting for the bill to mature.(r) The reason is, that what the

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(m) *Wolfe v. Jewett*, 10 La. 383. See *Starke v. Cheesman*, Carth. 509.

(n) *Infra*, chap. 11.

(o) *Infra*, chap. 12, 13.

(p) *Infra*, chap. 14.

(q) *Supra*, pp. 64, 313.

(r) *Bright v. Purrier*, Buller, N. P. 269; *Milford v. Mayor*, 1 Doug. 55; Lord *Eldon*, C. J., *Bishop v. Young*, 2 B. & P. 78, 83; *Boot v. Franklin*, 3 Johns. 207; *Miller v. Hackley*, 5 id. 375; *Robinson v. Ames*, 20 id. 146; *Wallace v. Agry*, 4 Mason, 336; *Sterry v. Robinson*, 1 Day, 11; *Winthrop v. Pepon*, 1 Bay, 468; *Evans v. Bridges*, 4 Port. Ala. 348; *Watson v. Tarpley*, 18 How. 517. In Mississippi it is declared by statute, that the holder shall not be sued till after maturity. In *Watson v. Tarpley*, the drawer lived in Mississippi, the bill was drawn on New Orleans, and the holder lived in Tennessee. The suit was brought in the United States court, and it was held that the statute did not affect the rights of the holder. Although there is no right of action

drawer had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract.<sup>(s)</sup> The holder has also the right to sue any indorser forthwith,<sup>(t)</sup> the latter being considered, in this respect, as a new drawer.<sup>(u)</sup> The amount which he is entitled to recover is the face of the bill, interest, costs of protest, and damages.<sup>(v)</sup> The same rules apply here as in the case of non-payment.

The holder may, if he pleases, present again for payment, but the liability of the drawer and indorsers having become fixed by proper presentment and notice of non-acceptance, irregularity of proceeding in presentment for payment and notice thereof will have no effect in prejudicing his right in this respect.<sup>(w)</sup> Nor need presentment for payment be averred, nor, if averred, need it be proved, the allegations to this effect being clearly surplusage.<sup>(x)</sup> There seems to be no lapse of time short of the Statute of Limitations which can affect this right of the holder to sue, or which can be considered negligence, as the same rule applies as in the case of liability on any other contract.<sup>(y)</sup>

The holder is, as has been said,<sup>(z)</sup> entitled to expect an absolute acceptance, and the other parties have also the right to

till notice of non-acceptance, the debt is considered to have accrued at the time of drawing the bill. *Macarty v. Barrow*, 2 Stra. 949, 3 Wils. 16. See *Puckford v. Maxwell*, 6 T. R. 52; *Hickling v. Hardey*, 7 Taunt. 312.

<sup>(s)</sup> Lord *Mansfield*, *Bright v. Purrier*, cited 1 Doug. 55, who said that the law on the point had been clearly settled so long ago as 1765.

<sup>(t)</sup> *Ballingalls v. Gloster*, 3 East, 481, 4 Esp. 268; *Mason v. Franklin*, 3 Johns. 202; *Weldon v. Buck*, 4 id. 144; *Aymar v. Sheldon*, 12 Wend. 439; *Bank of Rochester v. Gray*, 2 Hill, 227; *Watson v. Loring*, 3 Mass. 557; *Lenox v. Cook*, 8 id. 460; *Wild v. Bank of Passamaquoddy*, 3 Mason, 505; *Morgan v. Towles*, 8 Mart. La. 730; *Evans v. Gee*, 11 Pet. 80. In *Aymar v. Sheldon*, 12 Wend. 439, the bill was drawn in Martinique on Bordeaux. By the law of France, protest for non-payment, as well as for non-acceptance, is necessary to render the drawer and indorsers liable. The indorsement was made in New York. Held, that, although presentment for payment would have been necessary to charge the drawer, it was not necessary to charge the indorser.

<sup>(u)</sup> Lord *Ellenborough*, *Ballingalls v. Gloster*, 3 East, 481.

<sup>(v)</sup> *Sterry v. Robinson*, 1 Day, 11; *Weldon v. Buck*, 4 Johns. 144.

<sup>(w)</sup> *Miller v. Hackley*, 5 Johns. 375; *Evans v. Bridges*, 4 Port. Ala. 348. We have already seen that the holder is not bound to present again, at the request of the drawer, *supra*, p. 339.

<sup>(x)</sup> *Mason v. Franklin*, 3 Johns. 202; *Wallace v. Agry*, 4 Mason, 336.

<sup>(y)</sup> *Story, J.*, *Wild v. Bank of Passamaquoddy*, 3 Mason, 505, where a year had elapsed, and the drawer had become insolvent. Objections were made on these grounds to the right of the holder to recover against the indorser, but were overruled. See also *Lenox v. Cook*, 8 Mass. 460.

<sup>(z)</sup> *Supra*, p. 330.

require that the acceptance should be absolute, or else that they should know that such an acceptance had been refused. The reason is, that the drawer and indorsers promise to pay in case the drawee does not fulfil the contract expressed in the terms of the bill; because, if the holder had the right to receive a conditional or partial acceptance without their knowledge and consent, it would be, in fact, giving him the right to bind them by another and different contract from that into which they had entered. Therefore, if the holder take an acceptance varying from the terms of the bill, without giving notice to the prior parties, he discharges them. (a) If he causes the bill to be protested, and gives a general notice to all the parties of non-acceptance, that is considered as a refusal of the drawee's offer, and the latter is not bound. (b) Hence it would seem that the only course for a holder to pursue in such cases, in order to hold the drawee and the other parties, is to give them notice of the terms offered, and obtain their consent to his taking the acceptance.

It has been said that the effect of neglect to give notice where there is a conditional acceptance is done away or prevented by the completion of the conditions before the maturity of the bill; and a neglect, where there is an acceptance as to part, and a refusal as to the residue only, discharges the persons entitled to notice as to the residue only; but this has been doubted. These questions have never been distinctly settled by adjudication, and text writers do not agree in relation to them. (c)

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(a) *Bayley, J., Sebag v. Abitbol*, 4 Maule & S. 462, 466; *Paton v. Winter*, 1 Taunt. 419. In *Walker v. State Bank*, 5 Seld. 582, 13 Barb. 636, a bill drawn by the Empire Mills on A was presented by an agent of the holder, and accepted, "payable at the American Exchange Bank, Empire Mills, by A, Treasurer." The agent gave no notice of this acceptance to the holder, drawer, or indorsers. Held, that the agent should have treated the bill as dishonored, and given notice accordingly, and for neglect so to do was liable to the holder.

(b) *Sproat v. Matthews*, 1 T. R. 182. See *Bentinck v. Dorrien*, 6 East, 200; *Mitchell v. Degrand*, 1 Mason, 176.

(c) This is so stated in *Bayley on Bills*, 5th ed., 274, and by *Chitty*, 331, citing *Bayley*. *Story*, in his work on *Bills*, § 272, note, says, after quoting the remarks of *Bayley*: "It does not appear to me, that, upon principle, this doctrine can be supported; for the acceptance in both cases is contrary to the tenor of the bill, and may vary the rights and interests of the antecedent parties. The duty, therefore, would seem to be clear, that there should be a due protest, and due notice to the antecedent parties of the dishonor, and qualified or conditional acceptance, in order to bind them. This is the doctrine asserted by *Pothier*, *De Change*, n. 47. 48."

## CHAPTER XI.

### PRESENTMENT FOR DEMAND.

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#### SECTION I.

##### REASONS FOR THE REQUIREMENT OF DEMAND OF PAYMENT OF NEGOTIABLE PAPER, AND OF NOTICE OF DISHONOR.

IF a bill be regularly accepted, then the acceptor is bound as an original promisor, in much the same manner as the maker of a promissory note; and the other parties are regarded in the light of sureties, and are therefore liable only if the acceptor does not pay. They certainly are not sureties in the strict sense of this word, which bears a precise legal meaning of its own. But they are as sureties, in that they pay only if he who is as the principal debtor does not. The right and the duty of the holder of an accepted bill, or of a negotiable promissory note, are substantially the same. This right is to demand payment of all who are responsible on the paper. This duty and obligation are to give every one thus responsible all the opportunity to indemnify himself to which he is entitled by law. No one could hold another as a surety or guarantor in any form, if he brings the necessity of payment on the guarantor by his own wrongful negligence, or if by such negligence he makes such payment the ultimate loss of the guarantor, by depriving him of the means of indemnity to which he was entitled.

These universal principles of guaranty are applied to negotiable paper in a strict and peculiar way.

If we remember the especial purpose and use of negotiable bills and notes, and remember also that from this purpose and use springs all that system of law which belongs to them peculiarly, we shall understand the obligations of the holder of such paper, and see that they are as the conditions on which his rights rest.

The drawer of a bill is as a surety for the acceptor, and the

indorser is as a surety for the drawer (or for the maker of a note) and for every previous indorser. The design and the effect of this are to accumulate upon the bill the credit of as many persons as choose to lend their credit to it; for with every new element of security the adequacy of the paper to represent money, and take its place and do its work in business transactions, is increased.

But merchants who thus enable the holder to coin their credit are entitled to a certain protection; and the measure of this must be, that they are entitled to all the protection, meaning thereby all the efforts of the holder to save them harmless, and all the opportunities to save themselves, which are consistent with the free use of the instrument as money. Nor is this right of the parties founded merely on the justice due to them. It rests also upon the fact, that the safer indorsers are, the more readily will men of substance indorse, and therefore the more certain it will be that the paper will be paid on the day when, by its terms, this representative of money is to become money by payment.

It is for these reasons that the holder is bound, in the first place, to demand the payment of the paper, at its maturity, of the person who as the principal debtor is primarily bound to pay it. And then, if the amount due is not paid by this debtor, to demand it at once of each person who is as a surety for the original debtor, while some one else is as a surety for him; and this demand must be made successively through all the parties to the paper. By this means, every party to the paper as a surety is sure that he shall not be held as a surety by reason of any delay or insufficiency in demanding the money from him who is to the surety as a principal debtor.

The rules of law in respect to presentment, demand, notice of dishonor, and liability on negotiable notes and bills, stand forth from the main body of the common law as very distinct and peculiar. And yet they are nothing more, in substance, than a very rigorous and precise application of the general rules in respect to guaranty, and these rules flow from the most obvious principles of common justice. A guarantor in general is one who is bound to pay the debt of another if that other does not pay it. He is therefore a promisor on a condition. The condition is, that the principal debtor does not pay; and this means, that he does not pay when the debt is payable and is demanded;

and therefore an unsuccessful demand on the principal debtor is the proper evidence of his failure to pay the debt, and of the consequent liability of the guarantor. And if the guarantor can show that he has sustained a loss by the unreasonable neglect of the creditor in making this demand of the principal debtor, this should constitute a sufficient defence, because it would show that the plaintiff had failed in the discharge of an important duty, and that the defendant had been injured by this failure.

It must also be remembered, that parties who put their names on negotiable paper in such a way as to make them stand as sureties of other parties, are as sureties, not only on condition, but on two distinct conditions, and one of them on three. The drawer is bound only if due presentment for acceptance is made to the drawee, and then (the bill being accepted) if due demand be made on the acceptor for payment. And every indorser is bound only if due demand be made on the several parties before him for whom he stands as surety.

But further than this neither drawer nor indorser is bound, unless, in the first place, the requisite demand is duly made, and, in the next place, due notice is given that the demand is ineffectual.

These two duties, or necessities, are entirely independent, and the reasons for them rest upon distinct, although connected grounds. Every one who in any way guarantees a debt has a right to ask that this debt shall be collected of the principal debtor if it can be by reasonable endeavors; and such payment of it is of course a discharge of all claim on the guarantor; and the indorsers of negotiable paper are, as we have seen, as guarantors.

But if the creditor cannot collect the debt himself, it is always possible that the guarantor may, or may indemnify himself for his payment by something which he may do himself, or may compel the principal debtor to do. He is therefore always entitled to an opportunity to procure for himself this indemnity; and for this purpose he must have immediate notice of that necessity for it which is created by the non-payment of the debt he guarantees. These two rights on the part of the guarantor are therefore distinct, and the two correlative duties or obligations of the creditor are also distinct; and hence a full discharge of the one duty by the creditor is no excuse whatever for the non-discharge of the



other. That is to say, notice without demand leaves it uncertain whether a demand would not have been effectual. And demand without notice gives to the indorser no such opportunity of indemnifying himself as the very fact of an ineffectual demand on the principal makes it proper that he should have.

We have said that each indorser is entitled to have due demand made against all parties prior to himself, and to notice of non-payment. But in practice (a practice sanctioned by law to a great extent), demand against all parties but the principal payer is accompanied with notice of the default of that payer. Thus, if A be the maker of a note, B the payee, and C, D, E, and F indorsers, G, the last indorsee, makes his demand on A; and, if the note is not paid, gives to all the indorsers severally notice that the note is not paid, and at the same time makes a demand on them, stating that they, having indorsed the note, are looked to for payment.

These rules are, as will be seen, substantially the same with those which the law applies to all cases of guaranty. But, in relation to negotiable paper, the law merchant makes these rules far more precise and stringent than they are in relation to other contracts. Thus, it defines what is unreasonable delay, both as to demand and as to notice, by determining with great precision the very time within which both of these duties must be discharged. And it defines also the manner, means, place, and circumstances of the demand and of the notice, so as to leave as little as possible open for question. And the law merchant does this for the purpose of enabling mercantile men, or those who deal with mercantile paper, to know at once and precisely what their duties are, and what their rights are. And it dispenses with any proof of actual loss by the indorser, if the duties in his behalf are certainly neglected, by assuming peremptorily that one bound upon negotiable paper is injured if any delay occurs in a discharge by the holder of his duties in relation to it.

Such are the principles and reasons of the rules of the law merchant in regard to the demand of payment of negotiable paper, and notice of non-payment. And these rules will now be considered in reference to the questions, by whom, of whom, in what manner, when, and where the demand for payment should be made. And we will then consider the excuses which may be made for the omission or irregularity of demand of payment.

## SECTION II.

## BY WHOM DEMAND MAY BE MADE.

THE general rule must obviously be, that a demand of payment should always be made by the owner of the paper, either personally or by his duly authorized agent. For, as payment of a note can only be good when made to a party who has a right to receive the amount due thereon, and to give a valid discharge to the maker for the same, it would seem that payment can only be demanded by one who has the power to pass a valid title to the note, and to release the maker from all liability incurred by reason of the instrument. Where a demand is necessary before the promisor can be charged, it is clear that it must be a legal demand; that is, such as he is bound to comply with; and we can see no reason why there should be any difference in this respect between such a demand and one necessary in order to bind an indorser. We should say that the proper test, in any case, to determine whether the demand was made by the right person is this: Would the maker, by payment of the note to the party demanding payment, thereby buying up his own note, be placed in the same position as an ordinary *bona fide* holder of any other note. If he would, there can be no objection to the demand as regards the person making it. If he would not, it is believed that the demand would be insufficient, because not made by the right party.(d)

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(d) In *Robarts v. Tucker*, 16 Q. B. 560, a bill was accepted payable at a banker's, and the banker paid it with a forged indorsement thereon. The acceptor, having been obliged to pay the bill to the owner, sued the banker and recovered. *Parke, B.* said: "If this were the ordinary case of an acceptance made payable at a banker's, there can be no question that making the acceptance payable there is tantamount to an order, on the part of the acceptor, to the banker to pay the bill to the person who is, according to the law merchant, capable of giving a good discharge for the bill. Therefore, if the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine indorsement. And if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank, it is an authority to pay the bill to the person who seems to be the holder." In *Sussex Bank v. Baldwin*, 2 Harrison, 487, *Dayton, J.* said: "Any person may present, at its maturity, a promissory note of which he is put in possession, and if paid in the ordinary course of business, and taken up, the payment is good, and if not paid, the demand is good as a groundwork for notice to the indorsers." In *Bachelor v. Priest*, 12 Pick. 399, *Wilde, J.* said:

Demand may certainly be made by an agent duly authorized, and the agency for this purpose need not be created by a written instrument; it is sufficient if made by parol.(e)

The question has often arisen, whether a demand can be made by the clerk of a notary. It is clear that, in cases where a protest is unnecessary, the clerk may make the demand, for he is not to be considered as acting in any official capacity, but as the mere agent of the holder; and, as has been already said, such agency

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“A presentment by any person in possession of a bill *bona fide* is sufficient to charge the parties.” In *Leftley v. Mills*, 4 T. R. 170, 175, *Buller, J.*: “The party making the demand must have authority to receive the money.” A presentment, by the last indorser, of a bill indorsed in blank by the payee, but made payable to a particular person by the last indorsement, is sufficient to charge an indorser. *Bachelor v. Priest*, 12 Pick. 399. The question has arisen, whether possession by an indorser of a bill with a subsequent special indorsement, there being no prior indorsement in blank, is sufficient evidence of title. The following authorities hold that it is not, on the ground that it appears by the bill itself that the indorser has parted with his title, and a receipt from the last indorsee, or a reassignment, is necessary. *Welch v. Lindo*, 7 Cranch, 159; *Gorgerat v. M'Carty*, 2 Dall. 144, 1 Yeates, 94; *Thompson v. Flower*, 13 Mart. La. 301, where it is held that the fact that the last indorsement is cancelled is not sufficient; *Dicks v. Cash*, 18 id. 45; *Sprigg v. Cuny*, 19 id. 253; *Griffon v. Jacobs*, 2 La. 192; *Hart v. Windle*, 15 id. 265. In *Mendez v. Carreroon*, 1 Ld. Raym. 742, the plaintiff, an indorser, was nonsuited in an action by him against the acceptor, because he did not prove that he had paid the bill, having been sued by a subsequent indorser. In *Dehers v. Harriot*, 1 Show. 163, it was held that a bill payable to A, and indorsed by him to B, and by B to C, might be sued on by B. But it was said, in argument by the plaintiffs, that “we proved that C had no interest.” But the weight of authority, however, is in favor of the sufficiency of the evidence. In the following cases the last indorsement was cancelled. *Bank of Utica v. Smith*, 18 Johns. 230, where objection was made to the demand, on the ground that the last indorsee only could make it, but it was overruled. *Chautauque Co. Bank v. Davis*, 21 Wend. 584; *Manhattan Co. v. Reynolds*, 2 Hill, 140; *Dollfus v. Frosch*, 1 Denio, 367; *Brinkley v. Going*, Breese, 288; *Kyle v. Thompson*, 2 Scamm. 432; *Bowie v. Duvall*, 1 Gill & J. 175. In the following cases, prior possession of the bill, with the last indorsement uncanceled, was held sufficient. *Dugan v. U. S.*, 3 Wheat. 172; *Lonsdale v. Brown*, 3 Wash. C. C. 404; *U. S. v. Barker*, 1 Paine, C. C. 156; *Picquet v. Curtis*, 1 Sumner, 478; *Pitts v. Keyser*, 1 Stew. 154; *Johnson v. English*, id. 169; *Norris v. Badger*, 6 Cowen, 449; *Mottram v. Mills*, 1 Sandf. 37. See *Morris v. Foreman*, 1 Dall. 193. The case of *Welch v. Lindo*, 7 Cranch, 159, was decided in 1812, *Marshall, C. J.* delivering the opinion. The case of *Dugan v. U. S.*, 3 Wheat. 172, was decided in 1818, the opinion being by *Livingston, J.* These cases are in opposition to one another, and in the latter no reference is made to the former.

(e) *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Hartford Bank v. Stedman*, 3 Conn 489; *Bank of Utica v. Smith*, 18 Johns 230; *Hunt v. Maybee*, 3 Seld. 266; *Freeman v. Boynton*, 7 Mass. 483; *Hartford Bank v. Barry*, 17 id. 94, where *Parker, C. J.* said: “There is no case which requires that the person making the demand should be authorized by letter of attorney; it is sufficient that he has been requested to perform the act, and that he has the note to deliver on payment”; *Shed v. Brett*, 1 Pick. 40.

may be created by merely handing over the bill or note with instructions to demand payment.<sup>(f)</sup> But in cases where a protest is absolutely required as the only admissible evidence of dishonor, many authorities hold that, if the clerk makes the demand, it is insufficient to charge an indorser, on the ground that the notary has no right to delegate the authority conferred upon him by law.<sup>(g)</sup> There are some authorities, however, which hold that such a demand is sufficient, and others in which demand was actually made by the clerk, and no objection made to it on

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*Seaver v. Lincoln*, 21 id. 267, where the demand was made by a sheriff, who received the note and a writ, with instructions to demand payment, and in case of refusal to serve the writ. *Shaw, C. J.*: "An exception was taken at the trial, but not relied on at the argument, that the demand of payment was not made by the holder personally. I am not sure that I understand the ground of this exception. If it was intended that the demand was not made and the notice given by a person duly authorized, it is answered by the proof that the witness was expressly authorized by parol to make the demand and to receive payment, and he presented the note and had it ready to surrender, either to the promisor or to the indorser, upon payment. Such authority was amply sufficient, and payment to the witness would have been a good discharge." But in *Branch Bank v. Gaffney*, 9 Ala. 153, it was held that, in the case of indorsed paper, serving a writ by a sheriff was not a sufficient demand upon which to found a notice, because the writ does not authorize the officer to receive the money. *Sed quære.* In *Hartford Bank v. Barry*, 17 Mass. 94, the note was indorsed by the cashier of a bank, and transmitted to another bank, whose cashier caused the demand to be made. No evidence of any express authority was offered, or of any general authority in such cases. Objection was made to the demand, because not made by the holder or his authorized agent. But *Parker, C. J.* said: "As to the demand made on the maker of the note, and notice of non-payment to the indorser, in the case before us we can see no sound objection. The cashier of the Hartford Bank put his official signature on the back of the note, and sent it to the cashier of the branch bank in Boston, for the purpose of making the demand, and it was by him caused to be done. It is insisted that this act of the cashier of the Hartford Bank was without authority from the corporation. But we think that the authority may be implied, it being the duty of cashiers to see to the preliminary measures necessary to a suit upon notes. A cashier cannot transfer the property of the corporation in a note, without authority from them, or perhaps from the directors, pursuant to powers vested in them by the corporation; but he may do what is requisite for the recovery of a note. The defendant in this case has no right to deny the authority of the cashier, for the corporation ratify his act by bringing the action upon the act done by him. Had the note been sent on without any indorsement by the cashier, the demand would have been good. The indorsement amounts only to an authority to deliver the note to the maker or indorser, as either should pay it, and the payment to the person holding the note under such circumstances would have been a discharge."

<sup>(f)</sup> *Sussex Bank v. Baldwin*, 2 Harrison, 487.

<sup>(g)</sup> *Infra*, chapter on Protest. But if the law of the place where a note is payable sanctions demand by the clerk of a notary, such a presentment will be good in a place where it is necessary for the notary to make the demand himself. *McClane v. Fitch*, 4 B. Mon. 599.

that account.(*h*) Mr. Chitty, in an earlier edition of his work, seemed to cite with approbation a dictum of Buller, J., to the effect that such demand was insufficient. A correspondence was soon after commenced by the notaries of London, who insisted "not only that, by mercantile usage, such presentment is correct and regular, and is almost invariably adopted, but that, as far back as the memory of the oldest notary here can extend, it has always been the custom so to present them." And a case is mentioned in which a notary was allowed by Lord Ellenborough to give evidence of such a presentment by him of a foreign bill. They also said, that "commercial business must instantly come to a stand if a different rule prevailed; because it would be just as impossible for all the bills in this country to be presented in person by notaries as by bankers."(*i*)

In the latest edition of the work, an opinion is expressed by the learned editor that this practice "is amply justified by the law of principal and agent, and not questioned in any case which has occurred before the courts of England."(*j*)

If the holder is dead, the administrator or executor should make the demand, if any be appointed.(*k*) If none is appointed, the subsequent parties will not be discharged for want of presentment at maturity, if the executor or administrator causes demand to be made within a reasonable time after his appointment.(*l*)

If the holder is insolvent, demand should be made by his assignee, if any is appointed,(*m*) and if there be none, then it seems that the holder himself may present.(*n*) If the holder neglects, we should doubt whether his neglect should be permitted to prejudice his creditors, if assignees were appointed with no unreasonable delay, and forthwith made the demand.

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(*h*) *Infra*, chapter on Protest.

(*i*) Chitty on Bills, 12th Am. ed., 469, note 2.

(*j*) Chitty on Bills, 10th Eng. ed., 355, note 4.

(*k*) Story, Prom. Notes, § 250.

(*l*) *White v. Stoddard*, 11 Gray,

(*m*) Story, Prom. Notes, § 249.

(*n*) Story, Prom. Notes, § 249. In *Ex parte Moline*, 19 Ves. 216, 1 Rose, 303, Lord Eldon said, with reference to notice: "The bankrupt represents his estate until assignees are chosen." In that case it was held, that notice to a bankrupt, as drawer before the choice of assignees, was good.

It is said that any person who happens to be the holder of the bill at the time it falls due, whether by accident or otherwise, may and ought to demand payment, although he may not have the right to require it for his own benefit; (o) but we have seen that it may be doubted whether such holder should or could make the demand, unless he had the right to deliver up the notes on payment. In the case of a note made payable at a particular place, it will be seen subsequently, that presentment need not be made by any person, and that it is sufficient if the note is there ready to be delivered up by some one authorized to receive payment. (p)

### SECTION III.

#### OF WHOM DEMAND MAY BE MADE.

A PERSONAL presentment to, and demand of, the party *bound* to pay, is not strictly necessary before an indorser can be charged, for it is always sufficient if made to a person *authorized* to pay the bill or note, at the right place and time, and in the proper way. (q)

Presentment may be made to the acceptor or maker himself, or to his authorized agent, (r) and a presentment to the clerk of an acceptor or promisor, at his counting-house, has been held

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(o) Chitty on Bills, 365. The assignees of a bankrupt who was merely an agent may present and receive payment of bills and notes in their possession without being liable in trover, though they must pay over the proceeds when demanded by the party entitled to them. *Jones v. Fort*, 9 B. & C. 764, 4 Man. & R. 547; *Tennant v. Strachan*, Moody & M. 377, 4 Car. & P. 31.

(p) *Infra*, p. 365.

(q) For presentment where the maker cannot be found, see *infra*, p. 448; in case of bills or notes payable at a specified place, *infra*, p. 365.

(r) *Matthews v. Haydon*, 2 Esp. 509. If the drawee goes to sea, leaving an agent with power to accept bills, and the agent accepts one, it must be presented to the agent for payment, if the drawee continues absent. *Philips v. Astling*, 2 Taunt. 206. In *Belmont Bank v. Patterson*, 17 Ohio, 78, the notary went to a hotel where the acceptor had been boarding, and was informed that he had left town for a few days. Held, that the indorser was liable without presenting the bill to, or demanding payment of, any one at the hotel; *Birchard*, C. J. dissenting, on the ground that the notary should have inquired whether the wife of the maker, or some other party, had not been authorized to pay the bill in the acceptor's absence. The dissenting opinion would seem to be the better one.

sufficient, without showing any special authority given him under such circumstances.(s)

Presentment of a partnership note to one of the partners is sufficient; (t) and if one of two partners dies before maturity, presentment should be made to the survivor, and not to the representatives of the deceased, because the liability devolves upon the surviving partner.(u)

Where there are several promisors of a note who are not partners, it is necessary that the note should be presented to all

(s) *Draper v. Clemens*, 4 Misso. 52; *Stainback v. Bank of Virginia*, 11 Grat. 260; *Stewart v. Eden*, 2 Caines, 121; *Harris v. Packer*, 3 Tyrw. 370, note; *Reynolds v. Chettle*, 2 Camp. 596. But in *La State Ins. Co. v. Shamburgh*, 14 Mart. La. 511, the promisor, between the making and the maturity of a note, changed his domicile from one place to another in the same State. Demand was made on his agent, with whom he had left full powers to represent him in all things touching his affairs. Held insufficient to charge an indorser. *Sed quære*. In *Bank of England v. Newman*, 12 Mod. 241, *Holt*, C. J. held, "that a demand of a servant of the drawer, who used to pay money for him, was a good demand," to hold an indorser.

(t) "The general rule is, that where an acceptance is by partners, then the presentment for payment should be at their place of business, or at the dwelling-house of either of them." *Bacon, J., Otsego Co. Bank v. Warren*, 18 Barb 290. But in this case a notarial certificate of presentment "to one of the firm of W. B. & Co." was held insufficient to charge an indorser, because it did not state who composed the firm, nor the name of the person on whom the demand was made; and that evidence of the custom of notaries to make such entries in their certificates was inadmissible, the custom being bad. In *Shed v. Brett*, 1 Pick. 401, demand was made on one of two partners, and it seems to have been taken for granted that there was no objection on that account. In *Granite Bank v. Ayres*, 16 Pick. 392, demand was made of a partnership note, at the last place of business of the firm. An answer was given by the parties occupying the place, that the firm had failed and the partners had left town. (One of the partners was, however, living in town, and his name was in the directory. Held insufficient to charge an indorser. In *Erwin v. Downs*, 15 N. Y. 575, it was held that presentment to one of two persons who, by their signature, purport to constitute a partnership, is sufficient to charge an indorser. In *Crowley v. Barry*, 4 Gill, 194, an action by an indorsee against the payee and indorser of a partnership note, it was proved that the makers had dissolved partnership, giving public notice thereof in a newspaper in Washington, their place of business, and where the note was made, and also that one of the partners was authorized to settle up the partnership concerns. The plaintiff lived in Baltimore and had the note presented to the other partner. *Archer*, C. J. said: "It might be sufficient to say that this dissolution had by no evidence in the cause been brought home to the knowledge of the holder of the note. But we do not desire to determine the question on this ground, because we are clearly of opinion that a demand on one of the partners was sufficient, as each partner represents the partnership. Before a dissolution, it clearly would not be necessary to make a demand on both, nor could it be necessary after a dissolution, for the partnership, as to all antecedent transactions, continues until they are closed." A demand on the agent of one partner, after dissolution of the firm, in the absence of the partner, was held sufficient in *Brown v. Turner*, 15 Ala. 832.

(u) *Cayuga Co. Bank v. Hunt*, 2 Hill, 635.



before the liability of an indorser can accrue ; (v) but the authorities are not uniform upon this point. (w)

Where the maker dies before the maturity of the note, demand

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(v) In *Union Bank v. Willis*, 8 Met. 504, a note was signed by A, and on the back was the signature of B & Co., who were not parties to the note. The holder demanded payment of B alone. By the law of Massachusetts, the parties are liable as joint and several promisors. Held, that the demand was insufficient. *Hubbard, J.* said : " The precise question here presented, we believe, has not been decided in any reported case. If the joint and several promisors are to be considered in the light of partners, then a notice to one must be esteemed a notice to all, as partners are but one person in legal contemplation ; each partner, acting in such capacity, being not only capable of performing what the whole can do, and of receiving that which belongs to all, but by such acts necessarily binding all the partners. It follows, therefore, as an incident to such joint relations, that all the partners are affected by the knowledge of one. But in respect to mere joint and several promisors on a note, there is not such absolute community of interest between them, nor such necessary connection with each other, as to constitute them partners. The relationship is confined to the present specific liability of a joint and several promise, and which cannot be extended by the act of one so that his conduct shall necessarily bind the other. As between themselves, one promisor may be a mere surety, and the other the debtor ; one surety may have received security for lending his name, the other not. Or, if there are three joint and several promisors, two may be sureties, and the other the principal debtor, although the fact may not appear on the note. As the incidents, then, of a partnership do not attach to such a limited joint liability, there being neither a community of interests nor joint participation of profit and loss, the fact of knowledge on the part of the whole, from the actual knowledge of one, does not follow as a presumption of law ; and demand upon one is not, therefore, in law, a demand upon the whole. If then the bringing home of knowledge to each, or proof of a demand upon each, is a fact necessary to be proved, in order to bind third persons, then such knowledge, or such demand on each, must be proved as any other fact." It has been held that notice to each of two or more joint indorsers is necessary in order to render any indorser liable. *Sayre v. Frick*, 7 Watts & S. 383 ; *Shepard v. Hawley*, 1 Conn. 367.

(w) A demand upon one of three joint and several promisors was held sufficient in *Harris v. Clark*, 10 Ohio, 5. *Hitchcock, J.* said : " If we were to hold that a demand must be made upon all the makers in order to charge the indorser, such decision would operate to discharge many, if not all, indorsers of notes of a character similar to the one now under consideration. It will be seen that the note is not payable at any particular place ; if it were, a demand at the place would be sufficient. But as it is, a personal demand was necessary. Now suppose the makers resided in different States, or in different and distant parts of the same State, how could demand be made of all so as to charge an indorser ? It must be made on the day the note falls due, or, where days of grace are allowed, upon the last day of grace. Will it be said that demand can be made at different and distant places on the same day, through the agency of letters of attorney ? I believe such a practice has not been heard of, at least we have found nothing like it in the books." " Upon the whole, although we feel that there are apparent difficulties in the way, we see no substantial objection to considering the makers of a joint and several promissory note in the light of partners in that particular transaction. True, they may be sued separately, or, like partners, they may be sued jointly ; and as the joint and separate property of partners is liable for partnership debts, so the property of all and each of the makers of such a note may be subjected to its satisfaction." The answer to the main objection would be, that, where the makers live

should, in general, be made of his personal representatives ; (x) but where an executor or administrator is allowed by law a certain time within which to settle up the estate, and is not liable before the expiration of that period, it has been held that an indorser is liable without a demand on the maker, provided the note falls due within the time limited, (y) but not otherwise. (z)

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at so great a distance from each other as to make a demand on all on the day of maturity impossible, a demand at that time as to all but one, at least, is excusable.

(x) *Price v. Young*, 1 Nott. & M. 438; *Toby v. Maurian*, 7 La. 493; *Gower v. Moore*, 25 Maine, 16, where it was held, that knowledge on the part of the indorser that the maker had died, that his estate was insolvent, and that the note would not be paid, constituted no excuse for non-presentment. The holder had, prior to the maturity of the note, proved his claim in insolvency against the maker's estate, and notified the indorser of the death, and that he, the indorser, would be looked to for payment. The indorser was likewise notified again a month after the note fell due. The fact that the indorser has become the administrator does not dispense with demand and notice. *Juniata Bank v. Hale*, 16 S. & R. 157. In *Caunt v. Thompson*, 7 C. B. 400, an action by an indorsee against the drawer, the party having possession of the bill presented it at the acceptor's house, and said to the drawer, who had been made the executor of the acceptor, and was at the last place of abode of the latter: "I have brought a bill from C. (the plaintiff); you know what it is." The drawer replied: "I am the executor of the acceptor; you must persuade the plaintiff to let the bill stand over a few days, because the acceptor has only been dead a few days. I will see the bill paid." Held a sufficient presentment. But in *Magruder v. Union Bank*, 3 Pet. 87, 7 id. 287, it was held that, if the maker dies and the indorser is appointed his administrator, demand on him as administrator is necessary to charge him as indorser.

(y) This is so declared in Massachusetts, where the time limited is a year. *Hale v. Burr*, 12 Mass. 86, where *Parker, C. J.* said: "In England, however, there may be reasons for making a demand upon an executor or administrator of a deceased promisor in a note necessary, which do not exist in this country; and if the reasons upon which the law is founded do not exist, there is no cause why we should not decide according to the nature and spirit of the contract. In this State, a demand upon an administrator would in most cases be entirely nugatory. He is not obliged to pay any debt of the deceased, except such as are particularly privileged, until a year from his appointment. If sued within the year, he is entitled to a continuance of course. This indulgence is given to enable him to collect the effects of the deceased, and to ascertain their sufficiency to discharge all the debts. If there should be a deficiency, a general distribution takes place among all the creditors, without regard to the character of their demands, unless in the few excepted cases above alluded to. Under these circumstances, should he pay any debt, and it should afterwards appear that the estate is insolvent, he pays at his peril. A prudent executor or administrator will therefore seldom hazard the payment of a debt before he has ascertained the situation of the estate, and a demand upon him would be sure to meet with a refusal. Such a demand would, therefore, be merely a troublesome formality, without any use; and notice to the indorser that, the promisor being dead, he will be looked to for payment, will in every respect be as advantageous to him as a previous demand upon the promisor." See *Oriental Bank v. Blake*, 22 Pick. 206. This has been so held in Louisiana. *Landry v. Stansbury*, 10 La. 485.

(z) See *Hale v. Burr*, 12 Mass. 86; *Oriental Bank v. Blake*. 22 Pick 206. *Putnam*

It will be seen hereafter that the insolvency of the maker or acceptor forms no valid excuse for non-presentment.(a) And it has been held that a demand on the assignee is not sufficient.(b) Certainly, if there is no assignee, the demand should be made of the maker himself.(c) If the maker be an unmarried woman when the note is made, but marries before maturity, the husband is the proper party to whom the note should be presented, if he can be found.(d)

It may be added, that if the promisor should become a lunatic, or otherwise incapable of making a valid contract, presentment should of course be made to his guardian, or the parties having legally the management or control of his property and business.

We have already intimated, and shall show more fully hereafter, that, when a note or bill is payable at a particular place, no presentment or demand is necessary, as it is sufficient if the note or bill is at that place ready to be delivered up to the party calling for and prepared to pay it.(e)

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J. said: "But if the note should fall due after the expiration of the year, and the estate should not be represented insolvent, there would seem to be no reason why the holder should not make a demand on the executor or administrator of the promisor; for he would then be liable to a suit upon non-payment, and upon a demand he might safely pay; and the indorser would have reason to complain of the laches of the holder, if he had neglected to make a demand upon the executor or administrator, and to give notice of a default of payment, under such circumstances."

(a) *Infra*, p. 446.

(b) In *Armstrong v. Thruston*, 11 Md. 148, where the makers of a partnership note had failed, and an assignment had been made, a demand at the place of business of the assignee and trustee was held insufficient. *Bartol*, J. said the demand "ought to have been made on the makers, or at their place of business; their insolvency does not excuse the holder from a compliance with the statute."

(c) See *infra*, section on Excuses for Absence of Demand of Payment.

(d) In *Cromwell v. Hynson*, 2 Esp. 511, a bill had been presented to the drawee, and acceptance refused. The bill was then sent to the indorser's house, and shown to his wife, the husband being absent, and the circumstances communicated to her. Held a sufficient demand to charge the indorser.

(e) In *Reynolds v. Chettle*, 2 Camp 596, a bill accepted payable at H. & Co.'s, bankers, was presented at the clearing-house to their clerks. Held a sufficient presentment. So *Harris v. Packer*, 3 Tyrw. 370, note. In *Hunt v. Maybee*, 3 Seld. 266, a note, signed Jacob Ferdon, was presented at the place designated in pencil at the foot of the note, to a person who, on being asked, said that he was the maker. Held, *prima facie*, to be sufficient to charge an indorser. The defendant objected to the admission of the evidence that the party inquired of said he was Jacob Ferdon. *Edmonds*, J.: "This was complete proof, for it was part of the *res gestæ*; and besides, the objection is that it did not prove his identity, which is an objection as to sufficiency, not competency, and the evidence was offered, not to prove identity, but merely as a part of the maker's refusal to pay. There was no error there."

But if presentment is made at the place specified, or, in the case of a note payable generally, at the place of business of the acceptor or maker during business hours, or at his domicile at a reasonable hour of the day, it would seem that the presentment is sufficient if made to any person to be found on the premises, especially if the maker is absent or inaccessible, for it is the duty of the maker to be present and within reach, or, if absent, to leave some one to pay the note or bill. *(f)* In the case of bills payable at a specified place, it has been held that an allegation of presentment to the acceptor is proved by evidence of presentment at the place ; *(g)* or where the bill is payable at a banker's, by presentment to his clerk at the clearing-house. *(h)* But in such case it has also been held that an allegation of presentment at the place was sufficient, without any averment of presentment to either acceptor or banker. *(i)*

Where there is no person upon whom demand can be made, an indorser is liable without presentment; as where an agent, authorized to sign notes for his principal, made a note which was indorsed immediately after the making, and the principal was dead at the time, none of the parties being aware of his death, it was held that a demand was needless. *(j)*

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*(f)* See *Cromwell v. Hynson*, 2 Camp. 596, *supra*, p. 365, note *d*; *Philips v. Astling*, 2 Taunt. 206, *supra*, p. 361, note *r*; *Draper v. Clemens*, 4 Misso. 52. In *Buxton v. Jones*, 1 Man. & G. 83, 1 Scott. N. R. 19, decided since the Stat. 1 & 2 Geo. IV., a bill was addressed to the drawee, at the number of his house and the name of the street. It was accepted generally. The holder presented the bill at the door of the house to an inmate who was coming out. The acceptor had removed, and the inmate told the holder so. The holder left a card, containing notice of the maturity of the bill, with the inmate. The occupier of the house knew where the acceptor had removed. Held sufficient to charge an indorser. In *Branch Bank v. Hodges*, 17 Ala. 42, the presentment was made to the book-keeper of the acceptor, at his counting-room, the acceptor being absent. The drawer was held. In *Moodie v. Morrall*, 1 Const. R. 367, presentment was made to the wife of the maker, as she informed the notary that her husband was out of town. Held sufficient. Presentment at the acceptor's dwelling-house is sufficient, there being no one there to answer for him, and no provision having been made for payment at three o'clock, P. M. *Stivers v. Prentice*, 3 B. Mon. 461. See *Bellievre v. Bird*, 16 Mart. La. 186; *Hamer v. Johnson*, 15 La. 242; *Oakey v. Beauvais*, 11 id. 487.

*(g)* *Infra*, p. 427, note.

*(h)* *Supra*, p. 365, note *e*.

*(i)* *Infra*, p. 427, note.

*(j)* *Burrill v. Smith*, 7 Pick. 291.

## SECTION IV.

## IN WHAT MANNER DEMAND SHOULD BE MADE.

THE demand should be for an absolute, immediate payment in cash. This would be presumed to be the meaning of a simple demand of "payment." But if the holder saw fit to accept anything else in payment but cash, this would discharge the subsequent parties as effectually as a regular payment in money. *(k)*

The party making the demand should have the bill or note with him, and should exhibit it; because, as has already been seen, the payer has a right to require its delivery up to him before he pays, and may insist that the holder should produce it; and the latter must be in a condition to do so if required. *(l)* If his ability to present it be perfect, and it is, in fact, near and accessible, it may not be absolutely necessary that he should have it in his immediate personal custody, though this is proper. *(m)*

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*(k)* *Infra*, chapter on Payment of a Bill or Note.

*(l)* *Supra*, p. 230, note *x*. In *Musson v. Lake*, 4 How. 262, it was held that a protest, stating only that payment was demanded, is inadmissible to prove a presentment, because it should set forth that the notary had the bills in his possession at the time; *Woodbury and McLean, JJ.* dissenting, on the ground that, as a notary cannot make a legal demand without presenting the bill, it is a fair inference that he had it with him at the time of the presentment. Contra, *Nott v. Beard*, 16 La. 308; *Deyraud v. Banks*, id. 461. In *Bank of Vergennes v. Cameron*, 7 Barb. 143, the statement in the protest was, that the notary went with the draft to the bank, and demanded payment. Held that this was sufficient. *Harris, J.*: "In this case the notary states that he went with the draft to the bank and demanded payment. The language, I think, may fairly be deemed equivalent to saying that, when he made the demand, he had the draft with him, and was prepared, in case of payment, to surrender it to the person who should honor the draft on behalf of the acceptor. So far therefore as it relates to the presentment of the draft and the demand of payment, I am inclined to hold that the evidence furnished by the notarial certificate is sufficient." In *Draper v. Clemens*, 4 Misso. 52, a demand was held insufficient because it did not appear that the bill was produced. In *Freeman v. Boynton*, 7 Mass. 483, it appeared that the party demanding payment did not have the bill with him. Held insufficient. See *Smith v. Gibbs*, 2 Smedes & M. 479; *Farmers' Bank v. Duvall*, 7 Gill & J. 78.

So the indorser, upon offering to pay, has a right to insist on the delivery of the note as a condition of such payment; and a tender of the amount due is not rendered invalid by being made on such a condition, contrary to the general rule that a tender must be unconditional. *Wilder v. Seelye*, 8 Barb. 408.

*(m)* In *Tredick v. Wendell*, 1 N. H. 80, the note was in a bank within a few rods of the maker's house, and the maker was informed, by a letter from the cashier, where the note was, and requesting payment. Held sufficient to charge an indorser.

If on presentment the note is not asked for, and on this account it is not actually exhibited, but its identity is perfectly known to the party on whom the demand is made, there is no reason why the non-exhibition of it should vitiate the demand; (*n*) and indeed, the better rule, as drawn from the authorities, would seem to be, that in order to destroy the validity of the demand, on the ground that the note was not exhibited, the maker or acceptor should, either expressly or by implication, refuse to pay on that account; otherwise, he will be deemed to have waived his right to require that the note should be shown to him.

If the note or bill is lost, it is sufficient if the demand be made with a presentment of a true copy of the lost paper; (*o*) and where it is necessary to tender a bond of indemnity to the maker before he is liable, such a bond should also be presented.

But this rule respecting the necessity of presenting the note is subject to other exceptions. Thus, in Massachusetts, it has been the custom for a bank which becomes the holder of negotiable paper to issue a notice to the promisor a few days before maturity, informing him that the paper is in the bank, setting forth the date when it will be payable, and requesting him to come there and pay it. It is distinctly held in that State, that such previous notice to the promisor, with neglect on his part to pay the note at the bank, constitutes a conventional demand and refusal, which amounts to a dishonor of the note, and that it is not the delivery of the previous notice to the promisor which constitutes the presentment, but that it is the failure to pay at the bank, during bank hours on the last day of grace, which amounts to dishonor. (*p*) Indeed, this custom is said to have become so gen-

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(*n*) *Lockwood v. Crawford*, 18 Conn. 361, an action against an indorser of a note which had been partially paid by the promisor. *Church, C. J.*: "It is true that it does not directly appear that the payee presented the note in form, and demanded payment; but as he had not, at that time, transferred it, the makers might well presume it continued in his possession ready to be delivered upon payment. When called upon for the balance, they did not inquire for it, nor refuse to pay because the note was not shown to them; on the contrary, they said that they could not conveniently pay any more then, and requested the payee to draw upon them at a future time; thereby waiving, as they had a right to do, a more formal demand."

(*o*) *Hinsdale v. Miles*, 5 Conn. 331; *Posey v. Decatur Bank*, 12 Ala. 802.

(*p*) *Shaw, C. J.*, *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13, 23. The point was first decided in *Jones v. Fales*, 4 Mass. 245, where the note was not made payable at a bank, but the defendant, an indorser, was found to have been acquainted with the usage, and this fact was held to be admissible evidence of an agreement on his part to be bound



eral and universal, and it would seem, perhaps, to have become so far incorporated into the general law of that State, that every one who incurs the liability of maker and indorser may be supposed to have contracted with reference to it, and knowledge on his part may be presumed. (q) Evidence of such a mode of de-

thereby, though it did not appear that he had ever conformed to the usage. *Widgery v. Munroe*, 6 id. 449, where the defendant, an indorser, had been accustomed to leave his notes in the bank for collection, and had conformed to the usage. *Lincoln & Kennebeck Bank v. Page*, 9 id. 155; *Lincoln & Kennebeck Bank v. Hammatt*, id. 159, in which cases the note was made payable at the bank. In *Weld v. Gorham*, 10 id. 366, the note was not payable at a bank, and it was left to the jury to find whether the maker and the indorser, the defendant, were conversant of the usage, and they were directed, that the fact that the maker and indorser were directors of the bank, and the long continuance of the custom, were presumptive evidence of knowledge. In *Blanchard v. Hilliard*, 11 id. 85, the defendant, an indorser, was proved to have knowledge of the custom. In *State Bank v. Hurd*, 12 id. 172, the note was payable at a bank, and the notice, by direction of the maker and indorser, was left at a store of a third party. In *Peirce v. Butler*, 14 id. 303, it is said that evidence of the custom is sufficient to bind the indorser, if he had been conversant of the usage. In *Whitwell v. Johnson*, 17 Mass. 449, the note was not payable at a bank, the maker knew the custom, but there was no evidence that the defendant, an indorser, was acquainted with it. Held sufficient. *Parker, C. J.* : " If the indorser has seasonable notice of the fact of non-payment when the note is due, it must be immaterial to him in what form the demand upon the maker was made. If there had been no demand, he would not be liable, because it does not appear but that the note would have been paid, if demanded; and it is within the terms of the stipulation that such demand shall be made. But if there has been such a demand as the maker was bound by, so that he had no right to refuse payment, it is not easy to see how it concerns the indorser whether the legal forms have been complied with, or waived by the promisor. The case of *State Bank v. Hurd*, 12 Mass. 172, was decided upon this principle, and the only difference between that case and this under consideration is, that in that, the note was payable at the bank, and in this, it was not. But the circumstance was not essential, as it would not follow that *Hurd*, the indorser, was conversant of the usage of the bank merely because he indorsed a note payable there." These decisions are affirmed in *City Bank v. Cutter*, 3 Pick. 414; *Boston Bank v. Hodges*, 9 id. 420; *North Bank v. Abbot*, 13 id. 465; *Shove v. Wiley*, 18 id. 558, where the evidence of knowledge was that the indorser was frequently at the bank transacting business, and frequently paid notes there; *Central Bank v. Davis*, 19 id. 373; *Grand Bank v. Blanchard*, 23 id. 305.

(q) See *Grand Bank v. Blanchard*, 23 Pick. 305. *Shaw, C. J.* said : " But the custom of the banks of Massachusetts of sending a notice to the maker of a note to come to the bank and pay it, and treating his neglect to do so during bank hours on the last day of grace as a dishonor, . . . has become so universal, and continued so long, that it may well be doubted whether it ought not now to be treated as one of those customs of merchants of which the law will take notice, so that every man who is sufficiently a man of business to indorse a note may be presumed to be acquainted with it and assent to it, at least until the contrary is expressly shown. It is to be recollected that the rules respecting presentment, demand, and dishonor of bills of exchange and promissory notes, and indeed the *lex mercatoria* generally, originated in the custom of merchants, which custom was a matter of fact to be proved by the party relying on it, and



mand may be given in support of an averment of presentment to the maker.<sup>(r)</sup>

This custom has also been sanctioned by judicial decision in Maine ; <sup>(s)</sup> but it has been doubted, perhaps, in Maryland, <sup>(t)</sup> and in New Hampshire ; <sup>(u)</sup> at least the courts of these States do not

to be determined by the jury. But when a custom has been definitely settled by judicial decisions, it is taken notice of by courts as part of the law of the land, and need not be proved as a fact in each case "

<sup>(r)</sup> *City Bank v. Cutter*, 3 Pick. 414 ; *Boston Bank v. Hodges*, 9 id. 420 ; *North Bank v. Abbot*, 13 id. 466, where *Shaw*, C. J. said : " The principle of allowing some latitude in the mode of proof, where a presentment and demand are averred in the declaration, seems to be this : the plaintiff does not give in evidence matter strictly in excuse, but a qualified presentment and demand, or acts which, in their legal effect, and by the custom of merchants, are deemed equivalent to demand."

<sup>(s)</sup> *Gallagher v. Roberts*, 2 Fairf. 489 ; *Maine Bank v. Smith*, 18 Maine, 99.

<sup>(t)</sup> *Farmers' Bank v. Duvall*, 7 Gill & J 78. One of the head notes is as follows : " The practice of banks to give notice to the makers of notes of the time of their maturity, and place of deposit for collection, cannot, where such notice has been delivered, be substituted for a demand of payment so as to affect the indorser." This appears to be a broader statement than is warranted by the case. All that is decided with regard to the usage is that the evidence in the case did not prove it.

<sup>(u)</sup> *Moore v. Waitt*, 13 N. H. 415. In this case, the drawer, acceptor, and payee resided in different towns. When the payee received the bill, he told the drawer that he should get the bill discounted at the bank. Instead of doing this, he left it at the bank for collection. The custom of the bank, and of the banks of several adjoining towns, was given in evidence, but it did not appear that the drawer and acceptor knew of the custom. The suit was brought against the drawer, who defended on the ground that there had not been a sufficient presentment. Held, a good defence. *Parker*, C. J. : " It appears that the bill was left in the Framingham Bank for collection ; and the plaintiff relies upon a usage of that bank to notify the acceptor and drawer through the mail, on the last day of grace, as an excuse for a neglect to present the bill to the acceptors for payment. But we find nothing in the case to charge the defendant upon any usages of the Framingham Bank. The payee, when he received the bill, told the defendant that he should get it discounted at that bank. This he did not do, for a sufficient reason, but instead thereof left it in the bank for collection. The utmost effect that could be given to this would be as a notice to the defendant that the bill would be in that bank at its maturity. Such notice would in no way extend or vary his liability. The bill was not drawn payable at that bank ; nor would the notice, when the payee received it, that it would be left there, have any operation to bind the acceptors, or the defendant, to seek it at that place. Nor could the notice to the acceptors, according to the custom of the bank, when the bill became due, impose any greater duty upon them than existed when they first accepted the bill, or charge the defendant for their neglect to make payment at that place. It does not appear that the acceptors had any notice that the bill was there until after the last day of grace. The defendant had no agency in procuring the bill to be left there. Nor does it appear that he had any knowledge of the usages of the bank. If he had had such knowledge, that fact would not have operated as a waiver of his right to require that a demand should be made upon the acceptors, according to the general rules of the law, before payment was sought of him."

In *Leavitt v. Simes*, 3 N. H. 14, *Richardson*, C. J. said : " The usage of the banks

seem disposed to give it such effect as is allowed in Massachusetts. Even in Massachusetts it is a prevailing and very general, if not universal usage, for the banks to hand the dishonored note to a notary on the day that it matures and remains unpaid, and the notary makes the same demand that he would if no previous notice had been given.

Another exception is, when the maker calls upon the holder at his place of business the day the note falls due, and declares his inability to pay it, and requests the holder to give notice to the indorser. In such case it has been held that there was a demand sufficient to bind the latter, though the note was not shown.<sup>(v)</sup> This may, however, be considered rather as a waiver of the maker's right to insist upon its exhibition.

Another exception arises in the case of notes and bills payable at a specified place. Thus, when a promisor makes a note payable at his banker's, and the banker himself becomes the holder of the note, it is held to be a sufficient presentment to charge an indorser, if the banker turns to his books and examines the promisor's account; and a sufficient refusal, to find that there is no balance due the latter from the former.<sup>(w)</sup> It will also be seen hereafter, that, when a note or bill is payable at a specified place, it is sufficient if it is there at maturity, ready to be given up, on payment, to any party calling for and authorized to pay it.<sup>(x)</sup> It is not easy to see how a sufficient demand can be made with safety through the post-office.<sup>(y)</sup> A letter addressed to the

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is found, but it is not found that the defendant (an indorser) had ever conformed to the usage, or even that he was conusant of it. There is then nothing from which his assent to waive the want of a regular demand can be inferred. . . . We are of opinion, that it is not enough in this case to show the usage, and that the defendant was conusant of it. We think his assent to the usage is not to be inferred from the simple fact that he had knowledge of it. If it can be shown that he had conformed to the usage, it may deserve consideration whether his assent to it might not be inferred from his conduct. On the other hand, it will deserve very serious consideration, whether the admission of testimony to show the usage, and his assent to it, is not to admit parol evidence to vary the terms of a written contract."

(v) *Gilbert v. Dennis*, 3 Met. 495.

(w) *Saunderson v. Judge*, 2 H. Bl. 509.

(x) *Infra*, p. 434.

(y) In the following cases such a demand was held insufficient. *Halle v. Howell*, Harper, 426; *Gillespie v. Hanrahan*, 4 McCord, 503; *Stuckert v. Anderson*, 3 Whart. 116. In *Duke of Norfolk v. Howard*, 2 Show. 235, an action by the payee against the maker of a note payable within three months after the plaintiff should demand the same, the plaintiff's attorney "delivered a demand in writing at the defendant's house to his maid, by whom he sent it up to the defendant, he being sick and not

maker at his residence, stating that the note is due and unpaid, and demanding payment, even if it add the place of the note, would seem, on general principles, not to be a good demand, unless there were some usage justifying it. If the note were enclosed in the letter, and an immediate return made of the note, with an answer of refusal, this might hold the subsequent parties. But if the payee returned the note, and made no answer, or even retained it and refused, we should doubt whether any notice to subsequent parties could be predicated on such a refusal which would be sufficient to hold them.

A demand on the maker in the street is not, in general, sufficient; but it may be doubted whether it will not suffice to bind an indorser, unless objection be made to the place; or at least slight acts on the part of the maker would, we think, be construed as a waiver of his right to object on that account.<sup>(z)</sup> It has been held, that a demand on the maker by a sheriff serving a writ upon him, is not a demand upon which notice to an indorser can be founded; <sup>(a)</sup> though it will certainly be sufficient if the sheriff have the note in one hand and the writ in the other, and if, on refusal to pay the note, the sheriff immediately serve the writ.<sup>(b)</sup>

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to be spoken with; the maid brought down word she had delivered it to her master. Held, no good evidence to maintain the action, for the demand ought to be personal; and delivery of a demand in writing to the servant at the house is no good demand." *Sed quære.*

<sup>(z)</sup> *King v. Holmes*, 11 Penn. State, 456. *Rogers, J.* said: "The court correctly instructed the jury, that a demand in the street of an acceptor of a bill of exchange is not a sufficient demand. That when a bill is payable generally, and not at a particular place, the demand must be at the place of business of the acceptor. But if the notary, on his way to the place of business of the acceptor, meets him in the street, and informs him of his business, and where he is going, and the acceptor offers, if he will go to his place of business, to give him only a check on a broker, it is not necessary for the notary to proceed further. The demand at the place of business is waived by the payor or acceptor. It is, in effect, a refusal to pay, for an offer to pay by a check on a broker, in legal contemplation, is nothing; it is not such a tender as the notary would be justified in accepting. In this case the acceptor had no cause of complaint; for the notary offered to receive a check on one of the banks in payment of the bill." See *Fall River Union Bank v. Willard*, 5 Met. 216, cited *supra*, page 348, note *g*.

<sup>(a)</sup> *Branch Bank v. Gaffney*, 9 Ala. 153. It does not appear in the case whether the officer had the note with him or not, but the reason stated by *Collier, C. J.* is: "The writ or summons by which a suit is commenced does not invest the officer to whom it is addressed with authority to receive the money. It is not, in form, a request to pay it, nor does it suppose that the defendant therein will pay it, otherwise than by legal coercion." If the reason was that the sheriff did not have the note with him, the case is sound; otherwise, it would seem that the decision could not be sustained.

<sup>(b)</sup> *Seaver v. Lincoln*, 21 Pick. 267. See the cases cited *supra*, p. 359, note *e*

## SECTION V. X

## AT WHAT TIME DEMAND SHOULD BE MADE.

As to the time when demand should be made, the rule is, that in order to charge a drawer or indorser, it must be made on the day of the maturity of the note or bill. (c) If made before, (d)

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(c) "The general rule is, that it must be presented on the very day on which, by law, it becomes due; and that, unless the presentment be so made, it is a fatal objection to any right of recovery against the indorser. But although this is the general rule, it is not a universal one, and prevails only under the qualification, which is really a part of the rule itself, that there is no negligence or want of reasonable diligence in not making such presentment. The whole rule, therefore, more properly stated, is, that presentment must be on the day on which the bill becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it." *Storrs, J., Windham Bank v. Norton*, 22 Conn. 213. "A demand upon the maker of a note, in order to charge an indorser, must not only be made, but it must be satisfactorily proved to have been made, on the day when the note falls due, provided there be no circumstances dispensing with the necessity of such demand. . . . The witness relied upon to prove the time of the demand, is unable to state it. The writing which he signed, without date, affords him no aid by which he could be enabled to fix the time." *Whitman, C. J., Robinson v. Blen*, 20 Maine, 109. In this case a declaration by the holder to the indorser, that he had called on the maker the day the note became due, and that the maker refused, and the fact that the indorser did not deny it, were relied on as evidence to prove a demand at maturity. But the last facts were held to be no evidence, and the demand not satisfactorily proved.

(d) *Brown v. Harraden*, 4 T. R. 148; *Wiffen v. Roberts*, 1 Esp. 261; *Henry v. Jones*, 8 Mass. 453; *Leavitt v. Simes*, 3 N. H. 14; *Howe v. Bradley*, 19 Maine, 31; *Jackson v. Newton*, 8 Watts, 401; *Farmers' Bank v. Duvall*, 7 Gill & J. 78; *Edgar v. Greer*, 8 Clarke, Ia. 394. In *Griffin v. Goff*, 12 Johns. 423, *Spencer, J.* said: "In the present case the demand of payment, being made at the house of the drawer before the note was payable, is as no demand; it was a perfectly nugatory act; payment might have been demanded with as much propriety on the day the note was given." One of the chief objections which have been urged against the usage spoken of above, as existing in Massachusetts with reference to demand, has been, that the notice is sent out prior to maturity. But the demand is not considered as made at the time when the notice is given. See the remarks of *Shaw, C. J.*, cited *supra*, p. 369, note *q*, and the same eminent judge, speaking of this usage, says, in *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13: "Undoubtedly parties to negotiable notes may waive demand and notice, and, as a modification of that power, may agree to qualified modes of demand and notice; and a compliance on the part of the holders with such qualified modes will be sufficient to bind the indorsers. But we are not aware of a case in which, under such agreement, express or tacit, in regard to the mode of presentment, demand, and notice, the time of payment can be accelerated, or, where any notice to indorsers is required, that such notice can be given before the actual dishonor of the note. Any agreement which would accelerate the time of legal payment would be a change of the contract.

or after.(e) it is insufficient for that purpose, except where the demand is made subsequent to that time, under circumstances which the law recognizes as a valid excuse for a delay in making the demand.(f)

The liability of the maker or acceptor is unaffected by the question whether the demand was made after the day of maturity or not. A demand before the note or bill falls due is unavailing,(g) but a demand on either of them at any time subsequent to that date, provided it be within the period recognized by the Statute of Limitations, is sufficient.(h)

If a note is payable by instalments, there should be a demand of each instalment when it falls due.(i) But neglect of demand or notice on any one instalment would, as we think, discharge the indorser for that instalment, and only for that. If a note is payable by instalments, with the condition that, in default of payment of any one, the whole amount of the note shall become due, it would seem that, in order to hold the indorser for the amount of the bill unpaid, demand should be made for that amount, on default of payment of any one instalment; and it might be held, perhaps, that a neglect to demand any instalment would discharge an indorser, both for that and all subsequent ones;(j) we should have, however, some doubt as to this. If a note or bill is payable on demand, it is always mature, and may at any time be demanded. As between the maker and the holder, so far as maintaining an action on the note is concerned,

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and must be made in such form and on such consideration as would be sufficient to constitute a substantive contract."

(e) *Nicholson v. Gouthit*, 2 H. Bl. 609; *Woodbridge v. Brigham*, 12 Mass. 403; *Piatt v. Eads*, 1 Blackf. 81; *Fulton Co. v. Wright*, 12 La. 386; *Grant v. Long*, id. 402; *McMurchey v. Robinson*, 10 Ohio, 496; *Eldridge v. Rogers*, Minor, 392.

(f) As to what is a sufficient excuse, see *infra*, pp. 442-465.

(g) *Supra*, p. 373, note d.

(h) *Anderson v. Cleveland*, cited 13 East, 430, note c.

(i) In *Oridge v. Sherborne*, 11 M. & W. 374, the defendant, an indorser of a note payable in seven instalments, in an action against him for the fourth instalment, objected that the presentment to the maker had been three days too late, grace having been allowed. It was held that such a note was within the Stat. 3 & 4 Anne, c. 9, and that the presentment was in time; consequently the indorser was held. The implication from this case is, that, if presentment had been made either before or after that instalment fell due, the indorser would have been discharged. It will be seen hereafter, that *assumpsit* will lie by an indorsee for each instalment as it falls due, while debt will not.

(j) See *Carlon v. Kenealy*, 12 M. & W. 139.

no other demand than serving the writ is necessary ; (*k*) nor need any demand be averred in the declaration ; (*l*) nor, if it be averred, need it be proved. (*m*) But if the note is payable on demand, it may be necessary for the holder, if he wishes to charge the maker with interest from any date prior to that of the writ, to prove a demand at that date. (*n*) So far as the Statute of Limitations is concerned, the cause of action is considered to have accrued at the time of the date of a bill or note on demand, and the statute commences to run from that time. (*o*)

The question as to the time within which a note or bill on demand must be presented, in order to affect other parties by its dishonor, depends upon the time when it is to be considered as overdue. Hence arise two classes of cases with reference to this point. One, where the note or bill is overdue when payment is demanded, and therefore the indorser or drawer is discharged. In this case, in order to determine the question as to the liability of an indorser or a drawer, an examination is necessary into the fact whether presentment is made at a time when the note or bill became mature, or subsequent to that time. (*p*)

The other class of cases relates to the question whether, at the time when the note is transferred to a third party by indorsement or otherwise, such a time has not elapsed from the date of the

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(*k*) *Rumball v. Ball*, 10 Mod. 38 ; *Burnham v. Allen*, 1 Gray, 496. "As it respects the promisor himself, he is answerable immediately to the promisee or indorsee ; and he may be sued the instant he has given his signature, even without a previous demand." *Parker, C. J., Field v. Nickerson*, 13 Mass. 131 ; *Dougerty v. Western Bank*, 13 Ga. 287 ; *Woodward v. Drennan*, 3 Brev. 189 ; *Cammer v. Harrison*, 2 McCord, 246.

(*l*) *Rumball v. Ball*, 10 Mod. 38. "An action of debt upon a note to this effect : 'I acknowledge myself indebted, &c., which I promise to pay upon demand.' It was moved, in arrest of judgment, that, though upon a note acknowledging a debt it was not necessary to allege a demand, yet, where it is part of the agreement, there a demand is necessary. But the court was of another opinion, for it is a debt *in presenti*, and the words 'promise to pay' import no more than that I am ready to pay the money at any time, and shall not restrain or qualify the other words, this being no debt arising upon the performance of a certain condition, but a debt plainly precedent to the demand. Besides, supposing a demand necessary, the action itself, perhaps, is a demand."

(*m*) *Burnham v. Allen*, 1 Gray, 496.

(*n*) *Burnham v. Allen*, 1 Gray, 496, 499. See *infra*, chapter on Interest.

(*o*) *Norton v. Ellam*, 2 M. & W. 461 ; *Woodward v. Drennan*, 3 Brev. 189 ; *Cammer v. Harrison*, 2 McCord, 246 ; *Smith v. Bythewood*, Rice, 245 ; *Ruff v. Bull*, 7 Harris & J. 14. *Infra*, Vol. II. p. 642.

(*p*) *Field v. Nickerson*, 13 Mass. 131, *Parker, C. J.* ; and cases *infra*.



note that it must be considered as overdue, and consequently the maker is entitled to equitable defences, of which he would be deprived had it not been transferred before it was due.(q)

The law with regard to reasonableness of time would appear to be the same in both classes of cases, and is so held in the United States ; (r) at least, we are not aware of a case in this country where a distinction has been taken in that respect. But it has been held in England, that a note on demand is not to be considered as overdue so as to let in these equities by the mere lapse of time.(s)

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(q) See *supra*, p. 264, note y.

(r) In *Field v. Nickerson*, 13 Mass. 131, the two classes were placed on the same footing by *Parker, C. J.* So in *Sice v. Cunningham*, 1 Cowen, 397.

(s) There was an early case, *Banks v. Colwell*, cited 3 T. R. 81, where *Buller, J.* allowed the defendant to prove that the note was indorsed to the plaintiff a year and a half after date, and also to impeach the consideration ; and the plaintiff was nonsuited. But in *Barough v. White*, 4 B. & C. 325, where the question was with regard to the admission of evidence tending to sustain a want of consideration, the note was payable with interest, and the length of time that had elapsed does not appear. *Bayley, J.*, referring to the case of *Banks v. Colwell*, said : " We are not, however, acquainted with all the circumstances of that case ; payment might have been demanded before the indorsement, and indeed it is stated that several payments had been made on account." But these criticisms are hardly just. The case was clearly stated in the argument ; was approved by *Ashurst, J.*, without any objection as to the fact that the note was not overdue ; and as *Buller, J.* was himself on the bench at the time it was cited, he would surely have corrected it had it been misstated, and the case, having been decided only about nine months before, must have been fresh in his recollection. It will be seen also that *Brown v. Davies*, 3 T. R. 80, appears to have been decided on the authority of *Banks v. Colwell*. As to the fact " that payment might have been demanded before the indorsement," that would have been immaterial had the note not been overdue, because it is stated that " no privity was brought home to the plaintiff " ; as it is clear that a note indorsed over by the payee, after an insufficient demand, but before maturity, to a third party without knowledge of the fact, is a valid note in the hands of the latter. The same will apply to the fact, " that several payments had been made on account." *Bayley, J.* laid some stress on the fact, that the note was payable with interest. *Holroyd and Littledale, JJ.* said nothing about this in the report in 4 B. & C. 325, but mention it in 6 Dow. & R. 379. In *Brooks v. Mitchell*, 9 M. & W. 15, the note, payable with interest, was dated Dec. 24, 1824, indorsed first in March 12, 1836, and again to the defendant on Jan. 16, 1838. This was an action of trover by the assignees of the first indorser, who contended, inasmuch as the note was overdue at the time of the first indorsement, that they could prove that the indorser had no right to transfer it. No interest had been paid or demanded for four years. But *Parke, B.* said : " I cannot assent to the arguments urged on behalf of the plaintiffs. If a promissory note, payable on demand, is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security." There do not appear to have been any decisions in England with reference to the first class of cases. A question has arisen with reference to drafts on a banker and gold-



The rule on this point would also seem to be the same as that with reference to presentment for acceptance of bills payable after sight, *(t)* which we have already considered. *(u)* This rule is, that presentment must be made within a reasonable time after the indorsement in the case of bills, and after making in the case of notes, and that what constitutes such reasonableness of time cannot be determined by any fixed and exact rules, but must depend upon the particular circumstances of each case. *(v)* In all these cases, whether the question is one for the court or the jury to determine is perhaps unsettled; *(w)* the prevailing doctrine being,

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smith's notes, where they have been taken in payment, and the drawer has failed while the payee had them in his possession. This will be treated subsequently. See *infra*, chapters on Payment and Checks. Chitty, p. 252, 10th ed., London, says that they "must be presented within a reasonable time after they have been received"; and again, p. 261: "Instruments which are expressed to be payable on demand, as in the case of bankers' notes and checks, are payable instantly on presentment, and such instruments must be presented for payment within a reasonable time after the receipt of them, usually the next day." Byles, p. 123, says: "Bills and notes payable on demand, and checks, must be presented within a reasonable time"; — and on p. 164: "It is conceived that a common bill of exchange ought, if the parties live in the same place, to be presented the next day after the payee has received it." This is hardly consistent with the remarks of the judges in the cases cited *supra*, who almost all speak of a note on demand as intended to be "a continuing security." No cases are cited in support of the proposition, and those from which the opinion seems to have been formed are the cases of checks and banker's notes, where the drawer has failed, and the question has been, whether a party who received them in payment, or the party giving them as payment, should bear the loss; which is obviously a different question.

*(t)* See *Field v. Nickerson*, 13 Mass. 131; *Thurston v. M'Kown*, 6 id. 428; *Aymar v. Beers*, 7 Cowen, 705; *Brenzer v. Wightman*, 7 Watts & S. 264.

*(u)* *Supra*, p. 338, note c.

*(v)* *Field v. Nickerson*, 13 Mass. 131; *Sylvester v. Crapo*, 15 Pick. 92; *Ranger v. Cary*, 1 Met. 369; *Losee v. Dunkin*, 7 Johns. 70; *Vreeland v. Hyde*, 2 Hall, 429; *Bank of Utica v. Smedes*, 3 Cowen, 662; *Castle v. Candee*, 16 Conn. 223; *Lockwood v. Crawford*, 18 id. 361; *Emerson v. Crocker*, 5 N. H. 159; *Carlton v. Bailey*, 7 Foster, 230; *Cromwell v. Arrott*, 1 S. & R. 180; *M'Kinney v. Crawford*, 8 id. 351; *Brenzer v. Wightman*, 7 Watts & S. 264; *Martin v. Winslow*, 2 Mason, 241. In *Seaver v. Lincoln*, 21 Pick. 267, *Shaw*, C. J. said: "One of the most difficult questions presented for the decision of a court of law is, what shall be deemed a reasonable time within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another."

*(w)* In *Field v. Nickerson*, 13 Mass. 131, the question seems to have been decided by the jury. *Parker*, C. J.: "Was this demand made in a reasonable time? The jury have said, No; and they were perfectly justified in returning that answer." In *Manwaring v. Harrison*, 1 Stra. 507, the case arose on a goldsmith's note, whether a payor or a payee should bear the loss. *Pratt*, C. J. "told the jury that giving the note

that, where there is no dispute about the facts, the court will decide it; (x) and where the facts are not agreed upon, it is a mixed question of law and fact, and the court will instruct the

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is not immediate payment, unless the receiver does something to make it so, by neglecting to receive it in a reasonable time. . . . He left it to them whether there had been any neglect, and observed that the note was payable to the defendant, who had kept it eleven days, and probably would not have demanded it sooner than the plaintiff did, it appearing the goldsmiths were in full credit all the while. The jury desired they might find it specially, and leave it to the court whether there was a reasonable time, but the Chief Justice told them they were judges of that; whereupon they found for the defendant; and declared it as their opinion, that a person who did not demand a goldsmith's note in two days took the credit on himself." In *Hankey v. Trotman*, 1 W. Bl. 1, a case on a check, the question was left to the jury. In *Lancaster Bank v. Woodward*, 18 Penn. State, 357, 362, a check case, *Woodward*, J. said that, as to what is reasonable time, "Other authorities treat it as a question of fact, and this is perhaps the better opinion as to ordinary cases; but the delay in this case was so great, and the conduct of the bank was so grossly negligent entirely, that we think the learned judge was right in giving the jury the instructions he did."

In *Gray v. Bell*, 2 Rich. 67, 3 id. 71, reasonable time in making a demand of a note indorsed when overdue was held always to be a question of fact for a jury. See also *Chadwick v. Jeffers*, 1 id. 397; *Brock v. Thompson*, 1 Bailey, 322; *Benton v. Gibson*, 1 Hill, S. Car. 56; *Eccles v. Ballard*, 2 McCord, 388; *Hall v. Smith*, 1 Bay, 330, *Branch Bank v. Gaffney*, 9 Ala. 153. In *Sice v. Cunningham*, 1 Cowen, 397, it seems to have been treated as a matter of law. The judge told the jury, that "he had no doubt that five months and a half, the time given on this note, was an unreasonable length of time," but he told them to consider this in connection with the other facts in the case, &c. The charge was held incorrect. In *Ranger v. Cary*, 1 Met 369, the judge charged the jury, that unless the note had been transferred at least one month from date, it could not be considered as overdue. Held correct. In *Sylvester v. Crapo*, 15 Pick. 92, *Shaw*, C. J. said: "What is reasonable time is a question of law upon the facts proved." Byles (p. 163) says, it "seems to be a question of law." The cases cited were decided with respect to reasonableness of time in giving notice, but it is conceived that there may well be a difference in the law between the two classes of cases. See *infra*. The cases of *Medcalf v. Hall*, 3 Doug. 113, and *Appleton v. Sweetapple*, id. 137, arose on the question whether the payee made a banker's note received in payment his own, by not presenting in sufficient time. The payee did not present it till after banking hours on the same day he received it. *Buller*, J. thought there should be some general rule in such cases, and it should be that presentment was sufficient if made the next day. Lord *Mansfield* thought "the next day should be the rule if it stood clear of any usage, but he thought that clear usage might vary the rule." In these cases there appears to have been a struggle between the court and the jury. The jury found for the defendant five times, and on a motion for a sixth trial, the plaintiff was refused, on the ground that he ought to have objected to the introduction of evidence as to a usage to present the same day. *Chitty, Bills*, p. 262, 10th ed., London, says it is now settled to be, in general, a question of law. But the cases cited are mostly on the question of notice, and the others do not support the proposition. See *supra*, chap. 8, p. 268, note h.

(x) *Supra*, p. 269, note i. *Furman v. Haskin*, 2 Caines, 369; *Vreeland v. Hyde*, 2 Hall, 429; *Elting v. Brinkerhoff*, id. 459.

jury as the circumstances of each case require, and the jury will determine the whole question.(y)

One of the circumstances which have been considered as having an important bearing upon this question is, the fact that the note is payable with interest; the reason being, that neither the parties to it nor the indorser contemplated an immediate demand, but all looked to the real time of payment as intended to be future, and to the indorsement as a continuing guaranty.(z)

Whether evidence is admissible of an agreement or understanding between all the parties that the note should not be demanded till some future day, has been somewhat considered. In some cases it has been doubted whether such evidence is admissible, on the ground that it would be allowing parol evidence to vary the written contract.(a) In another case, it was considered as material in determining the question of reasonable time, and not as controlling the terms or tenor of the note.(b) It is necessary for the indorser or maker to be a party to the agreement, if it is to be considered as admissible.(c)

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(y) *Supra*, p. 269, note j.

(z) *Church, C. J., Lockwood v. Crawford*, 18 Conn. 361. In *Wethey v. Andrews*, 3 Hill, 582, *Cowen, J.* said: "If it (the note) had not been on interest, not being a bank-note, I should have thought it right to presume that it had been demanded, and payment refused (perhaps even within a week). I would presume it on the unwillingness which every prudent man feels to have his money lie idle; and would presume that the holder had seen or sent to the maker immediately, and pressed him for payment. But I think that directly the contrary is to be presumed with regard to this note, which bore interest. No one would understand the parties to intend that these words meant interest for a few weeks only; nor would the payee or purchaser of a note ordinarily desire to take it on the terms of a payment so soon. It would be contrary to the general course of business to demand payment short of some proper point for computing interest, such as a quarter, half a year, year, &c." But in *Sice v. Cunningham*, 1 Cowen, 397, it was held that the fact that the note was payable with interest did not take it out of the ordinary rule, and the same opinion is expressed in *Perry v. Green*, 4 Harrison, 61, 64. Some importance is given to this fact by *Bayley, J.*, in *Barrough v. White*, 4 B. & C. 325, but *Holroyd* and *Littledale, JJ.* do not mention it. They do, however, speak of it in the same case as reported in 6 Dow. & R. 379. *Parke, B.*, in his opinion in *Brooks v. Mitchell*, 9 M. & W. 15, does not advert to it.

(a) *Sice v. Cunningham*, 1 Cowen, 397; *Perry v. Green*, 4 Harrison, 61.

(b) *Lockwood v. Crawford*, 18 Conn. 361. See *Brock v. Thompson*, 1 Bailey, 322. In *Field v. Nickerson*, 13 Mass. 131, the point was touched upon, but not decided.

(c) *Perry v. Green*, 4 Harrison, 61. See *Martin v. Winslow*, 2 Mason, 241. In *Lord v. Chadbourne*, 8 Greenl. 198, it was doubted whether the fact that the indorser requested the indorsee not to call upon the maker "at present" would excuse a delay of six months.

The authorities are not uniform as to the effect of notes which are given as a security for a loan, or as accommodation paper; the better opinion being, that such notes should be placed on the same footing as others. *(d)* The distance at which the parties reside from each other has some effect on this question as to what is reasonable time, a shorter period being allowed when the parties live in immediate proximity. *(e)*

Where there are several payments indorsed on the note, the time of the last payment is said to be that from which the reasonable time is reckoned. *(f)*

When the note is offered in evidence, duly indorsed, there being no date to the indorsement, the presumption is, that it was indorsed before its maturity, and the burden is upon the party seeking to invalidate the note on the ground of dishonor before indorsement, to show that the transfer took place after a reasonable time had elapsed. *(g)* But when it is once shown to have been transferred to the holder at a time which would, in general,

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*(d)* In *Vreeland v. Hyde*, 2 Hall, 429, the note was witnessed, and payable "without default or defalcation." It was given for a loan, and no demand was made for twenty-one months. The question was whether the indorser should be discharged. "The rule requiring a presentment within a reasonable time was intended for, and is applicable to, negotiable instruments *made for commercial purposes only*. It was not intended for cases of suretyship, or notes of a like description, and the present one is evidently excluded from the *rule*, by the peculiar circumstances attending it. Here the holder was an old man, not connected with business, residing at some distance from the city. The defendant knew these circumstances, and cannot claim any peculiar indulgence from a consideration of the facts. As each case is governed in some degree by the circumstances attending it, in this there must be judgment for the plaintiff." But the better doctrine is that laid down in *Sice v. Cunningham*, 1 Cowen, 397; *Perry v. Green*, 4 Harrison, 61, where it was held that the general rule applied to notes given for loans. In the latter case it was also held that an indorsement for the maker's accommodation was to be considered as any other indorsement. "It makes no difference in the case, that the indorsement was in lieu of a former security between the same parties, or was for the accommodation of the maker, unless the indorser assented to the delay." *Story, J., Martin v. Winslow*, 2 Mason, 241.

*(e)* *Tilghman, C. J., Cromwell v. Arrott*, 1 S. & R. 180, 184. See *M'Kinney v. Crawford*, 8 id. 351; *Nash v. Harrington*, 2 Aikens, 9, 1 id. 39; *Eccles v. Ballard*, 2 McCord, 388. For the circumstances bearing on this question, as regards presentment for acceptance, see *supra*.

*(f)* *Sanford v. Mickles*, 4 Johns. 224

*(g)* *Ranger v. Cary*, 1 Met. 369. Nor is the burden removed by proof that the note was delivered to the holder before dishonor, but was not indorsed till afterward. *Ibid.* In this case the indorsement was not written till two years after the transfer. The judge charged the jury, that the title was vested in the holder at the time of delivery and when the consideration was paid, as regards letting in the equities. Hold corre &

be considered as beyond the period recognized as a reasonable time, or where no demand has been made upon the maker for the purpose of fixing the liability of an indorser within that period, the burden is then shifted upon the holder, or the party seeking to enforce a claim by means of the rule, to show such circumstances as will amount to a legal excuse for not presenting the paper sooner.<sup>(h)</sup>

A note or bill in which no time of payment is mentioned is equivalent to a note on demand, and it is held that no evidence is admissible to affect the bill by proof of a different agreement.<sup>(i)</sup>

A note indorsed after maturity is equivalent to a note on demand, so far at least as regards the necessity of presentment to the maker in order to charge the indorser.<sup>(j)</sup> The demand

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<sup>(h)</sup> *Martin v. Winslow*, 2 Mason, 241 ; *Hendricks v. Judah*, 1 Johns. 319 ; *Emerson v. Crocker*, 5 N. H. 159.

<sup>(i)</sup> *Piner v. Clary*, 17 B. Mon. 663 ; *Thompson v. Ketcham*, 8 Johns. 189 ; *Herrick v. Bennett*, id. 374 ; *Cornell v. Moulton*, 3 Denio, 12 ; *Bennett, J., Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11, 20 ; *Whitlock v. Underwood*, 2 B. & C. 157, 3 Dow. & R. 356, placing such notes on the same footing as those on demand, with reference to the stamp act ; *Sheehy v. Mandeville*, 7 Cranch, 208, where the declaration did not state when the note was payable, and the note, when offered in evidence, proved to be payable at a definite time, — held a fatal variance ; *Bacon v. Page*, 1 Conn. 404, where the declaration was held bad for not averring the note to be payable on demand, although it concluded by averring "that the defendant hath never performed the same, though often requested and demanded," &c. ; *Green v. Drebilbis*, 1 Greene, Ia. 552, where it was held that the words "on demand" need not be used in the declaration, and that words of similar import were sufficient. In *Bank of Utica v. Smedes*, 3 Cowen, 662, the declaration alleged an undertaking by the defendants to charge the first indorser of notes payable on demand, and set forth the first indorsement to the plaintiffs as having been made on a day certain, the indorsement and delivery of the notes by the plaintiffs to the defendants about six months after, and their undertaking at the latter time. Held sufficient, especially after verdict, though the declaration did not aver that the demand of payment was made within a reasonable time. *Froeman v. Ross*, 15 Ga. 252.

<sup>(j)</sup> In the following cases, where it was contended in argument that no presentment was necessary, it was held that demand must be made. *Berry v. Robinson*, 9 Johns. 121 ; *Leavitt v. Putnam*, 1 Sandf. 199 ; *Bishop v. Dexter*, 2 Conn. 419 ; *Dwight v. Emerson*, 2 N. H. 159 ; *Bank of North America v. Barriere*, 1 Yeates, 360 ; an early Pennsylvania case to the contrary must be considered as overruled by *M'Kinney v. Crawford*, 8 S. & R. 351 ; *Patterson v. Todd*, 18 Penn. State, 426 ; *Ecfert v. Des Coudres*, 3 Const. R. 69 ; *Course v. Shackleford*, 2 Nott & McC. 283 ; *Alewood v. Haseldon*, 2 Bailey, 457 ; *Levy v. Drew*, 14 Ark. 334 ; *Poole v. Tolleson*, 1 McCord, 199 ; *Benton v. Gibson*, 1 Hill, S. Car. 56. But in *Gray v. Bell*, 3 Rich. 71, *O'Neill, J.* said : "I am however prepared to go much further, and to hold that the indorser of a note negotiated after due, is to be regarded either as a new maker, or as the drawer of a bill on a man without funds ; in neither of which cases is a demand of payment or notice at all necessary. But a majority of the court is not as yet prepared to go so far."

must be made within a reasonable time ; (*k*) and with regard to what shall be considered reasonable time, it is laid down by some authorities that the same strict rules are not to be applied as are required where a note has still time to run. (*l*) But other authorities seem to place the two classes of cases on the same footing, (*m*) and it is believed with better reason ; for the law on

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(*k*) *Sanborn v. Southard*, 25 Maine, 409 ; *Branch Bank v. Gaffney*, 9 Ala. 153 ; *Benton v. Gibson*, 1 Hill, S. Car. 56 ; *Van Hoesen v. Van Alstyne*, 3 Wend. 75 ; *Bishop v. Dexter*, 2 Conn. 419.

(*l*) *Duncan, J.*, *M'Kinney v. Crawford*, 8 S. & R. 351 ; *Hall v. Smith*, 1 Bay, 330 ; *Chadwick v. Jeffers*, 1 Rich. 397 ; *Gray v. Bell*, 2 Rich. 67, 3 id. 71. In *Rugely v. Davidson*, 4 Const. R. 33, *Guntt, J.* said : " But when a note is indorsed after it is due, the transaction assumes a different aspect. It is no longer a case within the custom and usage of trade ; the expectation of punctuality of payment from the drawer has vanished, and the holder, in ordinary transactions of this kind, looks rather to the person with whom he has contracted than to the drawer, for indemnity."

(*m*) In *Dehers v. Harriot*, 1 Show. 163, all the merchants agreed " that a bill negotiated after the day of payment was like a bill payable at sight." By a statute in Massachusetts, sixty days from the date of a note is declared to be the period of reasonable time within which demand is to be made upon the promisor, in order to charge an indorser ; and in *Rice v. Wesson*, 11 Met. 400, where the indorsement was made more than sixty days from the date, the court expressed an opinion to the effect that the same length of time was still to be considered as reasonable. They also decided that the defendant was not liable, because the holder, having demanded payment earlier than he was obliged to, neglected to give the indorser notice, although a subsequent demand was made within a reasonable time, and notice of the last demand was duly given. In *Bishop v. Dexter*, 2 Conn. 419, *Gould* and *Hosmer, JJ.* expressly say that there is no difference between the rules applicable to each class. So *Collier, J.*, *Kennon v. M'Rea*, 7 Port. Ala. 175 ; *Adams v. Torbert*, 6 Ala. 865 ; *Branch Bank v. Gaffney*, 9 id. 153. See *Esfert v. Des Coudres*, 3 Const. R. 69 ; *Course v. Shackelford*, 2 Nott & McC. 283 ; *Poole v. Tolleson*, 1 McCord, 199, where *Richardson, J.* said : " If it be asked when notice is to be given, I can only answer that, in my individual judgment, immediate notice is as much required in such a case as in any other. Not only simplicity and uniformity require that the same rule should prevail, but there is the same force of reason and necessity in the one case as the other, whether we argue from the letter, the allowed import of the contract, or from the consequences which may follow." These same reasons would appear to apply all the more strongly to presentment.

There are two early cases in Vermont, where an opinion is expressed, that at least as much strictness, if not more, is necessary in the case of an indorsement after maturity as in any other. Thus, in *Nash v. Harrington*, 2 Aikens, 9, a note on demand was indorsed eight months from date, and was treated as overdue. The holder neglected presentment till the seventh day after the indorsement to him, and it was held that the indorser was discharged. *Hutchinson, J.* said : " Under these circumstances, the demand should have been made in a day or two at furthest." The same judge said, in *Aldis v. Johnson*, 1 Vt. 136, 140 : " If the indorsement be made after the note falls due, the demand of payment must be made as if the note fell due the day of the indorsement."



the subject of reasonableness of time would seem to be of itself sufficiently difficult, without burdening it with unnecessary distinctions and uncertainties, which can only serve to render it more difficult and obscure.(n)

A bill payable at or after sight must, as has been seen, be presented for acceptance within a reasonable time,(o) and also, if accepted, at maturity for payment;(p) and a note so payable must likewise be presented for payment within such time, before the maker's liability can accrue.(q)

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(n) The tendency to create confusion by introducing distinctions on this point may well be illustrated by the decisions in South Carolina, which are almost as numerous as those of all the other States together, and many of them cannot be reconciled one with another. It has been held in that State, that the question of reasonableness of time, in case of notes indorsed after maturity, is one which the jury are to decide; *Hall v. Smith*, 1 Bay, 330; *Eccles v. Ballard*, 2 McCord, 388; *Benton v. Gibson*, 1 Hill, S. Car. 56; *Brock v. Thompson*, 1 Bailey, 322; *Chadwick v. Jeffers*, 1 Rich. 397; *Gray v. Bell*, 2 id. 67, 3 id. 71. In *Gray v. Bell*, 2 Rich. 67, *Butler*, J. said, in speaking of the diligence in respect to demand and notice where the note is indorsed after it is due: "This diligence does not admit of such exact definition as always to be a question of law, but must, as it would seem from our decisions, be left, under all the circumstances of the case, to the decision of a jury. The kind of diligence that should be observed and pursued by an indorsee, in respect to the collection of a note indorsed before due, is well settled by certain and acknowledged rules, and is such as always to make it a question of law for the court." It is difficult to see any good reason for such a distinction as this. In *Brock v. Thompson*, 1 Bailey, 322, it was held that parol evidence of a stipulation by the indorser, at the time of the transfer, that the maker should be indulged as to time by the holder, is admissible to show the degree of diligence to which the holder was bound. In this case the agreement was that the maker should not be called on for one half the amount of the note till the next winter, and for the other half till the spring following. A demand was made in November, a second during the winter, and a third on March 1st. No notice appears to have been given, except of the last demand. Held sufficient evidence of due diligence to go to a jury, and a verdict for the plaintiffs was sustained. In *Benton v. Gibson*, 1 Hill, S. Car. 56; *Chadwick v. Jeffers*, 1 Rich. 397; *Gray v. Bell*, 3 id. 71, 2 id. 67, it was held that service of a writ on the maker was sufficient, if known to the indorser at the beginning of the suit or immediately after; and in *Gray v. Bell*, 3 Rich. 71, 2 id. 67, where the maker and indorser were sued by separate writs served simultaneously, it was held that the mere fact that the suits were commenced at the same time was sufficient to carry with it a presumption of knowledge on the part of the indorser, and to justify a verdict of the jury in favor of the holder. In *Chadwick v. Jeffers*, 1 Rich. 397, *Frost*, J. said that the duty of the holder in respect to demand and notice "is limited to the use of such diligence, according to the circumstances of the case, that the indorser suffer no injury through his remissness or neglect." And finally, as has already been stated, in *Gray v. Bell*, 3 Rich. 71, *supra*, p. 381, note j, *O'Neill*, J. said, that in his opinion no presentment at all to the maker was necessary.

(o) *Supra*, p. 338, note c.

(p) See *supra*, p. 373.

(q) See *supra*, p. 376.



A note "on demand at sight" is the same as if payable at sight.(*r*)

If a note or bill be payable on time, whether that time begins to run from the date, or from sight or demand, the question sometimes arises as to how the time is to be computed. The word "month" means in the law merchant a calendar month, and has always been so interpreted in relation to notes and bills.(*s*)

A note or bill is usually payable at a certain number of days "after" sight, demand, or date, and this word certainly excludes the day of the presentment;( *t*) or, in the case of a bill presented on one day, but accepted on another, the day of acceptance,(*u*)

(*r*) *Dixon v. Nuttall*, 1 Crompt. M. & R. 307.

(*s*) *Leffingwell v. White*, 1 Johns. Cas. 99; *Thomas v. Shoemaker*, 6 Watts & S 179; *Wagner v. Kenner*, 2 Rob. La. 120; *McMurchey v. Robinson*, 10 Ohio, 496. See *Cockell v. Gray*, 3 Brod. & B. 186; *Jolly v. Young*, 1 Esp. 186.

(*t*) In *Coleman v. Sayer*, 1 Barnard. 303, an action against the indorser of a bill payable at six days after sight, "the Chief Justice said that the day of sight is to be taken exclusive, for the law will not allow of fractions in a day." In *Bellasis v. Hester*, 1 Ld. Raym. 280, the plaintiff declared upon a bill payable at ten days after sight, seen and accepted May 5th. The teste was dated May 15th. The defendant prayed that the writ might abate, and the plaintiff demurred. The defendant contended that the day should be excluded, "because it is always so understood among merchants." The court were of opinion that the custom should have been pleaded specially. *Powell and Nevill, JJ.* decided that the day should be included, but *Treby, C. J.* held that it should be excluded. "1. Because the bill may be seen the last minute of the day, and that may be intended as reasonable as that it was seen the first minute; 2. the party may have the whole day to view the bill, and that is allowed him by the law; 3. because the contrary construction seems absurd; for then, if a bill be payable one day after sight, it must be paid the same day that it is seen, which is not the day after the sight, as the bill requires." In *Lester v. Garland*, 15 Ves. 248, Sir Wm. Grant, M. R. said: "It is now settled that the day upon which a bill is presented is to be excluded, though it had been ruled otherwise by three judges of the Court of Common Pleas against the opinion of *Treby, C. J.*" See *Blanchard v. Hilliard*, 11 Mass. 85, where it is said that the usage of banks in Massachusetts had formerly been to include the day of date; *Woodbridge v. Brigham*, 12 id. 403, 13 id. 556; *Presbrey v. Williams*, 15 id. 193, by *Jackson, J.*, who said, "because otherwise a note payable in one day would be the same as a note payable on demand."

(*u*) *Mitchell v. DeGrand*, 1 Mason, 176, *Story, J.*: "A bill payable in so many days after sight, means after so many days' legal sight. Now it is not merely the fact of having seen the bill, or known of its existence, that constitutes a presentment to the drawee in legal contemplation. It must be presented to him for acceptance, and the time of the bill begins to run, not from the mere presentment, but from the presentment and acceptance." "The doctrine of relation cannot apply to cases of this nature."

demand, or date,(v) and includes the day on which the note is mature.(w)

If it be payable at sight,(x) or after any particular event, the rule is the same. The same construction is put upon the words "in,"(y) "from,"(z) "from date," and "from the day of the date," and they are held to be synonymous.(a)

A question has arisen with reference to notes payable on demand, as to whether the Statute of Limitations is to be construed as excluding the date, or including it, and the authorities on this point are conflicting.(b)

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(v) *Fisher v. State Bank*, 7 Blackf. 610; *Taylor v. Jacoby*, 2 Penn. State, 495; *Barlow v. Planters' Bank*, 7 How. Miss. 129; *Henry v. Jones*, 8 Mass. 453; *Homes v. Smyth*, 16 Maine, 181; *Ammidown v. Woodman*, 31 id. 580; *Avery v. Stewart*, 2 Conn. 69, where the note was not negotiable.

(w) *Ripley v. Greenleaf*, 2 Vt. 129, 132. It is, in fact, always so computed. Thus in *May v. Cooper*, Fortes. 376, the defendant pleaded a tender on Aug. 1st of a note dated July 21st, payable in ten days, and it was held to be a day too late. In *Cramlington v. Evans*, 2 Vent. 307, a bill drawn Nov. 10th, at twenty-five days from date, was presented Dec. 5, and it was alleged for error that "there were, as appears by the bill of exchange, twenty-five days given for the payment of it after the date of the bill; whereas here the request and refusal is upon the twenty-fifth day after the date *Si d non allocatur*, for, as the bill is set forth, it is to pay the money *ad viginti et quinque dies post datum*, and this can't be if not paid at the five-and-twentieth day." In *Hartford Bank v. Barry*, 17 Mass. 94, where a note dated May 20th, at four months with grace, was demanded Sept. 23d, a point reserved at the trial at *Nisi Prius*, that the demand was a day too early, was abandoned by the counsel for the defendant.

(x) This would seem to depend upon the question whether days of grace are allowed on bills at sight. If they are, the date would be excluded; otherwise the bill would become, it is conceived, payable immediately. See this subject treated of *infra*, pp. 404-406.

(y) *Henry v. Jones*, 8 Mass. 453, where the court said: "In the case at bar, the note was made payable in sixty days, without adding, as is customary, from the date. But the intention is apparent, and the court will supply the omission. The meaning must be the same as in sixty days from the date, otherwise a note payable in one day would be payable immediately, which would be an absurdity." *Leavitt v. Simes*, 3 N. H. 14; *Blake v. Crowninshield*, 9 id. 304. See the remarks of *Howard, J.*, cited *infra*, note z. The date was excluded in case of a note payable in nine months without grace, in *Hill v. Norvell*, 3 McLean, 583.

(z) *Henry v. Jones*, 8 Mass. 453; *Avery v. Stewart*, 2 Conn. 69. In *Ammidown v. Woodman*, 31 Maine, 580, *Howard, J.* said: "If there be several notes of the same date, some payable in six months, some in six months from date, and some in six months after date, they all have the same pay-day. In all of them the day of the date is excluded."

(a) *Henry v. Jones*, 8 Mass. 453. "Where a note is payable in a certain number of days from the date, or from the day of the date, the day of the date is to be excluded." So *Gibson, C. J.*, *Taylor v. Jacoby*, 2 Penn. State, 495.

(b) In *Preshrey v. Williams*, 15 Mass. 193, the note was dated Feb. 16th, 1810. On Vol. I.—Z

If a note or bill has no date, or a void or impossible one, the time must be computed from the day on which it was delivered or issued ; (c) because there would seem to be "no other certain indicium of the time of its taking effect." (d) Where no date or delivery is shown, the date is to be considered, it would seem, as

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Nov. 1st, 1811, a payment had been made and indorsed upon the note. The action was commenced Nov. 1st, 1817. *Jackson, J.* said : "By the Statute of Limitations it was intended that the plaintiff should have six full years, and no more, within which to bring his action. In this case he might have brought his action on the 1st of November, 1811, as upon a new promise then made, supposing that the action had been previously barred by the statute ; and if he may also commence it on the 1st day of November, 1817, it would make seven first days of November in the six years prescribed by the statute. In the construction of a promissory note, payable in a certain number of days, the day of the date is excluded ; because, otherwise, a note payable in one day would be the same as a note payable on demand, and this is the reason given in the case of *Henry v. Jones*," 8 Mass. 453, *supra*, note y.

The contrary was held in *Cornell v. Moulton*, 3 Denio, 12, where *Bronson, C. J.* said : "Our cases all go to establish one uniform rule, whether the question arises upon the practice of the court, or the construction of a statute, and the rule is to exclude the first day from the computation."

(c) In *De la Courtier v. Bellamy*, 2 Show. 422, "the fact was alleged to be, that a party drew such a bill such a day, and the same was afterwards presented to, and accepted by, the defendant. An exception was taken, that the date of the bill was not set forth, and the court held it was well enough, and they would intend it dated at the time of drawing it." In *Hague v. French*, 3 Bos. & P. 173, the first count in the declaration stated that the defendant, on the 15th day of September, 1800, drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The second count stated that afterwards, to wit, on the day and year aforesaid, the defendant drew a certain other bill of exchange, payable two months after date. No express date was mentioned in either count, but they were both held to be good. In *Giles v. Bourne*, 6 Maule & S. 73, 2 Chitty, 300, the plaintiff declared, that "on February 22d, 1816, A made his bill of exchange, and thereby required the defendant, four months after date, to pay at Messrs. V. & Co." &c. On demurrer because no date was assigned to the bill, it was held that the declaration was good, for it might "be intended that the date of the bill was the day on which it was alleged to have been made." A distinction attempted to be taken between *Hague v. French*, 3 Bos. & P. 173, and this case, that the former came before the court on a writ of error, and the latter on demurrer, was overruled. In *Mechanics' Bank v. Schuyler*, 7 Cowen, 337, note a, *Sutherland, J.* said : "Where they (a note or bill) have no date, the time, if necessary, may be inquired into, and will be computed from the day they were issued." Where an award has no date, the time must be computed from the delivery. *Armitt v. Breame*, 2 Ld. Raym. 1076. So where a deed has no date, or an impossible or void one. *Com. Dig. Fait*, (B. 3) ; *Styles v. Wardle*, 4 B. & C. 908. So in a lease ; *Bac. Abr. Leases*, (E) 2, Rule 2, 1 ; and in a bond ; *Goddard's case*, 2 Rep. 5.

(d) *Bac. Abr. Leases*, (E) 2, Rule 2, 1. This was said with reference to leases, but there seems to be no good reason why it should not apply to notes. The language sometimes used is, that a note without a date takes effect from the time of its *making* but this, it would seem, is inaccurate.

that time when the note or bill can first be proved to have a legal existence.(e)

We have seen that, although a note does not take effect until delivery,(f) and is said to be considered as made on the day it is delivered,(g) yet this must be so only as regards the title or the validity of the contract; but in respect to the question of computation of time,(h) the note takes effect from its date, by relation in case it is ante-dated, and prospectively where it is post-dated.(i) One reason of this is, that it would otherwise be

(e) Thus, in *Mahier v. Le Blanc*, 12 La. Ann. 207, the case turned upon the point whether a draft was accepted prior to, or subsequent to, certain judgments. *Buchanan, J.* said: "The draft purports to be dated November 30th, 1849, but being a writing *sous seing privé*, it has, *per se*, no date as against third persons. The acceptance of the draft bears no date, and for the determination of the antiquity of the claim of plaintiff, as compared with the contracts and judgments which she seeks to annul, the only date which can be assigned to that claim is the date of the protest, to wit, November 4th, 1850; for no other proof has been adduced of the existence of the draft, or of any other legal consideration for the same, at a previous date to that protest." *Chitty* (p. 370, 10th ed., London) says: "In general, the date of a bill or note should be stated, and if there be no date, then the day it was made; and if that cannot be ascertained, then the first day it can be proved to have existed." *Quære*, whether a note where no date or delivery can be ascertained might not in some cases be considered as payable on demand?

(f) *Supra*, p. 48, *et seq.*

(g) In *Lansing v. Gaine*, 2 Johns. 300, *Kent, C. J.* said: "The date of the notes then becomes immaterial, as they were valid only from the time of their delivery; and unless the contrary be shown, the presumption will be that they were then actually drawn, and were antedated by mistake or design. If they had been previously drawn, they had no force while in the possession, and under the control, of the maker. To all legal purposes, the notes are to be considered as made or drawn when they were delivered." But this language, which is rather too broad, was used with respect to the question whether a partnership note, dated before dissolution, but not issued till afterwards by one of the partners, bound the others, and it was held that it did not.

(h) In *Brewster v. McCardel*, 8 Wend. 478, *Sutherland, J.* said: "The date of a note is in no respect material, except for the purpose of determining when it is payable."

(i) The time from which the Statute of Limitations begins to run on a note is reckoned from the date, not from the delivery. *Bumpass v. Timms*, 3 Sneed, 459. So on an acceptance. *Montague v. Perkins*, C. B. 1853, 22 Eng. L. & Eq. 516. In *Styles v. Wardle*, 4 B. & C. 908, *Bayley, J.* said: "When there is no date, or an impossible date, that word must mean delivery. But where there is a sensible date, that word in other parts of the deed means the day of date, and not of the delivery . . . . The question here is, What, in this covenant, is the meaning of *datus*? I consider that a party executing a deed agrees that the day therein mentioned shall be the date for the purposes of computation. It would be very dangerous to allow a different construction of the word *date*; for then, if a lease were executed on March 30th, to hold from the date, tho' it being the 25th, and the tenant were to enter and hold as if from that day, yet, after the expiration of the lease, he might defeat an ejectment on the ground that the lease

difficult to know when the note was due, and much inconvenience would arise and great risk be incurred from an uncertainty as to the proper time of making the demand. It would seem that a maker would be estopped from setting up in defence, that a demand, though made at a proper time from the date, was not made at maturity, reckoning from delivery, the evidence of which would in many cases be uncertain ; (j) and it cannot be supposed that any such defence would be open to an indorser or any other party. We should not even admit that the holder might have his option as to which period of time he would use in reckoning the date of maturity, for it is obvious that the former mode is far preferable, as tending to create greater uniformity and certainty in the law on this point.(k) It may here be remarked, that it is immaterial on what part of the note the date is written.(l)

The New Style, or mode of reckoning the year according to the Gregorian Calendar, is used everywhere except in Russia and those countries in which the Greek Church is the established religion, and these still adhere to the Old Style, following the Julian Calendar.(m) In order to convert the Old Style to the New, it is now necessary to insert twelve days. Thus, if a bill is drawn in Russia, January 1st, 1861, the date would correspond with January 13th in this country.(n)

was executed on a day subsequent to the 25th of March, and that he did not hold from that day." In *Powell v. Waters*, 8 Cowen, 669, 687, *Jones*, Ch. said : " A note has no binding force, or legal inception, nor constitutes any contract, until delivered and in the hands of a *bona fide* holder. It acquires the form of a contract from the delivery, and not, *ab initio*, from the execution of it. But when delivered it takes effect from its date, and for all substantial purposes becomes a binding contract upon the maker *ab initio*."

(j) He certainly would be, where a holder for value received the note in ignorance of the facts. Thus, in *Huston v. Young*, 33 Maine, 85, a note dated January 14th, 1847, payable in two years, was sued October 8th, 1849. The maker offered to prove that the note was made in 1848, that the date 1847 was a mistake, and consequently that the suit was premature. The holder bought the note before maturity, unaware of the mistake. Held, that the evidence was inadmissible.

(k) See the remarks of *Bayley*, J., cited *supra*, note i.

(l) *Sheppard v. Graves*, 14 How. 505, where it was written at the foot, opposite the makers' names.

(m) See *Encyclopædia Britannica*, Vol. VIII. pp. 76 - 78, tit. *Calendar*.

(n) Gregory directed that October 4th, 1582, should be followed by the 15th. The year 1600 being a leap-year, both according to the Gregorian and Julian Calendar, no further change occurred until 1700, which being a common year by the Gregorian and a leap-year by the Julian, the difference between the New and Old Style became greater

In the case of bills drawn in a country using one style, and payable in a country using another style, if a bill is payable at a fixed period, the style of the country where it is payable governs the time of maturity. Thus, if a bill is drawn in London, dated January 13th, 1861, which is January 1st, 1861, according to the Old Style, on St. Petersburg, payable at one month after date, it will, if accepted generally, be payable on February 4th. And conversely, a bill drawn in St. Petersburg on London, dated January 1st, will under like circumstances be payable on February 16th.(o) If a bill is payable after sight, or on or after demand, the computation is unaffected by any diversity of style.

Usance sometimes comes into the calculation of the time, if the bill be drawn on a country in Continental Europe. This means the time which is fixed by the usage of the countries between which the bill is drawn for its payment ; (p) a bill being drawn at so many usances instead of so many days.

We doubt whether usage has determined any usances between this country and the countries of Europe, our bills being, usually at least, drawn at a certain number of days or months instead of usances, and this practice is said now to be taking the place of drawing at usance in Europe.(q) Usances are calculated exclusive of the day of the date, and days of grace are allowed on bills so drawn.(r) A half-usance is always fifteen days when usance is a month, notwithstanding the unequal length of the months.(s) Mr. Chitty(t) gives a full list of those which exist between England and the countries on the Continent, and we have placed them in our note.(u)

by one. A like increase, for a similar reason, took place in the year 1800, so that now the Old Style is twelve days in advance of the New.

(o) That is, adding the days of grace. Story on Bills, § 331 ; Chitty, 10th ed., London, 253.

(p) Chitty on Bills, 10th ed., London, 254 ; Story on Bills, § 50.

(q) Chitty on Bills, 10th ed., London, 254.

(r) Chitty on Bills, 10th ed., London, 254 ; Story on Bills, § 332.

(s) Byles on Bills, 160 ; Marius, 93.

(t) Chitty on Bills, 10th ed., London, 255 - 257 ; Story on Bills, § 332, note 2

(u) Between London and

Aleppo, 1 month after date (sometimes accounted treble usance).

Altona, 1 month after date.

America, North, 60 days.

Amsterdam, 1 month after date.

Antwerp, 1 month after date.

Bahia, none.

Barcelona, 60 days after date.

Berlin, 14 " " sight.

Bilboa, 2 months after date.

Another circumstance to be taken into consideration in ascertaining the time at which a note or bill is to be paid, is, that in most cases the note or bill is not mature at the precise time mentioned in it, but three days after. This allowance is usually

Bordeaux, 30 days after date.	Madrid, 60 days after date.
Brabant, 1 month " "	Malta, 30 " " "
Brazil, none.	Middleburgh, 1 month after date.
Bremen, 1 month after date.	Milan, 3 " " "
Bruges, " " "	Naples, 3 " " "
Buenos Ayres, none.	Netherlands, 1 " " "
Cadiz, 2 months after date.	Oporto, 60 days " "
Constantinople, 31 days after date.	Palermo, 3 months " "
Dantzic, 14 days after acceptance.	Paris, 1 " " "
Flanders, 1 month after date.	Portugal, 60 days " "
Florence, 30 days after date (sometimes accounted treble usance).	Rio de Janeiro, none.
France, 30 days after date.	Rotterdam, 1 month after date.
Frankfort-on-the-Main, 14 days after acceptance.	Rome, 3 " " "
Geneva, 30 days after date.	Rouen, 1 " " "
Genoa, 3 months " "	St. Petersburg, none.
Germany, 30 days " "	Seville, 60 days after date.
Gibraltar, 2 months after sight.	Smyrna, 31 " " "
Hamburg, 1 " " date.	Spain, 60 " " " (except Cadiz
Holland, 1 " " "	Sweden, 30 " " sight.
Italy, 3 " " "	Switzerland, 30 days after sight.
Leghorn, 3 " " "	Trieste, 14 " " acceptance.
Leipsic, 14 days " acceptance.	Venice, 3 months after date.
Lisbon, 60 " " date.	Vienna, 14 days after acceptance.
Lisle, 1 month " "	West Indies, 31 days after "
Lucca, 3 " " " (sometimes).	Zante, 3 months after date.
	Zealand, 1 month after date.

Between Amsterdam and  
 Brabant, 1 month.  
 Breslau, 14 days after sight.  
 Flanders, 1 month.  
 France, 1 "  
 Frankfort, 14 days after sight.  
 Germany, 14 " " "  
 Hamburg, 14 " " "

Between Altona, Hamburg, and  
 Fiume, 2 months after date.  
 France, 1 " " "  
 Germany, 14 days after sight.  
 Holland, 1 month after date.

Between Amsterdam, Antwerp, Rotterdam, and  
 Dantzic, 30 days after sight.  
 England, 1 month after date.  
 France, 1 " " "

Holland, 1 month.  
 Italy, 2 "  
 Nuremberg, 14 days after sight.  
 Portugal, 2 months.  
 Spain, 2 "  
 Vienna, 14 days after sight.  
 Zealand, 1 month.

Italy, 2 months after date.  
 Portugal, 2 " " "  
 Spain, 2 " " "  
 Trieste, 2 " " "

Germany, 14 days after sight.  
 Italy, 2 months after date.  
 Königsberg, 30 days after sight.



called grace ; which, as its name imports, was originally a favor, and could not be demanded as a right by the payer, but depended upon the inclination of the payee.(v)

It appears that in England, from an early time, the length of this period in foreign bills was three days,(w) and that it was for a short time somewhat doubtful whether any grace was given in the case of inland bills ; (x) or if given, whether it was three days or a "reasonable time."(y) It may be supposed that in foreign

Portugal, 2 months after date.

Spain, 2 months after date.

Riga, 30 days after sight.

Switzerland, 14 days after sight.

Genoa, abolished by the Code Napoleon.

Holland, Venice, and Hamburg, 2 months after date.

Between Leghorn and

Hamburg, 2 months after date.

Paris, 1 month after date.

Holland, 2 " " "

Spain, 2 " " "

Lisbon, 3 " " "

Between Lisbon, Oporto, and

France, 60 days after sight.

Italy, 3 " " "

Germany, 2 months after date.

Spain, 15 days after sight.

Holland, 2 " " "

Palermo and most places, except London, 21 days after sight.

(v) Chitty on Bills, 10th ed., London, 258.

(w) Hill v. Lewis, Skin. 410 (1694), Holt, C. J. In Tassell v. Lewis, 1 Ld. Raym. 743 (1696), it is said that, "In case of foreign bills, the custom is that three days are allowed for payment of them ; and if they are not paid upon the last of the said days, the party ought immediately to protest the bill and return it ; and by this means the drawer will be charged ; but if he does not protest it the last of the three days, which are called the days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable ; for it shall be reckoned his folly that he did not protest." See Coleman v. Sayer, *infra*, note y ; Brown v. Harraden, 4 T. R. 148.

(x) In Cramlington v. Evans, 2 Vent. 307 (1691), an action against the drawer, the bill was drawn in Newcastle, Nov. 10th, 1685, payable in twenty-five days from date. It was alleged for error, that "there were, as appears by the bill of exchange, twenty-five days given for the payment of it after the date of the bill ; whereas here the request and refusal is upon the twenty-fifth day after the date. *Sed non allocatur* : for as the bill is set forth, it is to pay the money *ad viginti et quinque dies post datum* ; and this can't be if not paid at the five and twentieth day." There is no mention of grace made in this case.

(y) In Tassell v. Lewis, 1 Ld. Raym. 743 (1696), it is said that "There is no custom for the protest of inland bills of exchange, nor any certain time assigned by the custom for the payment of them ; therefore, the money ought to be demanded in a reasonable time ; and then, if it is not paid, the drawer will be charged." But in Coleman v. Sayer, 1 Barnard. 303, "the other matter then came into debate whether three days of grace in certain are allowable upon inland bills, as well as upon foreign ones. or whether only a reasonable time. The Common Sergeant and the foreman of the jury said that the constant practice in the city was to allow them in one case as well as the

bills a reasonable time was at first allowed, which custom was finally limited to three days, for the sake of uniformity and precision, and that the same thing happened in inland bills. It was also for some time a "*vexata questio* in Westminster Hall" whether a promissory note was entitled to grace; (z) but this was finally settled in the year 1791, by a decision of the Court of King's Bench, where it was held that the three days were to be allowed on promissory notes, and on inland as well as foreign bills.(a)

In some of the States of this country, the courts early held that foreign bills alone were entitled to grace, and denied the indulgence to inland bills and promissory notes; but in all these

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other. Upon which the Chief Justice said that then he would not alter it; though he observed that he remembered two cases, one in Lord C. J. *Kelynge's* time, the other in Lord *Holt's*, where they were both of opinion that in inland bills it is only a reasonable time; and what that is, the jury ought to determine." In *Brown v. Harraden*, 4 T. R. 148, 151, Lord *Kenyon* said: "It is extremely clear that on foreign bills of exchange three days of grace are allowed. I think it is as little to be doubted that they are also allowed on inland bills. . . . When it is stated in 1 Ld. Raym. 743, that there was no certain time assigned by the custom of merchants for the payment of inland bills of exchange, it only shows that the judges were very cautious on the subject; but now it has been settled for more than half a century that they are payable at the same time as foreign bills of exchange."

(z) In *May v. Cooper*, Fortes. 376 (1722), the defendant pleaded a tender, on August 1st, of a note dated July 21st, payable in ten days. Held a day too late. In *Dexlaux v. Hood*, Buller, N. P. 274 (1752), *Denison*, J. said there were no days of grace on a note as there are on a bill of exchange; but the jury said it was commonly understood that there were three days of grace, and therefore thought the demand in time; but the judge said the law was otherwise, and directed them to find for the defendant. In *Brown v. Harraden*, 4 T. R. 148, *Buller*, J. said: "The question whether three days of grace shall or shall not be allowed on promissory notes has, for many years past, been a *vexata questio* in Westminster Hall. But the practice among merchants and bankers has been uniform in favor of the indulgence. The doubt which has arisen in our own time has been principally founded on the determination of Mr. J. *Denison*, at *Nisi Prius*; though it appears that the jury there said that the judge's opinion was against the practice; and that case has always been handed down in print with a *quere*. And since I have sat upon the bench, I have always held at *Nisi Prius*, that the three days are allowed, whether the question has arisen on the supposed laches of the holder, or in cases of usury."

(a) *Brown v. Harraden*, 4 T. R. 148, an action by an indorsee against the indorser of a bill payable November 2d. The defendant pleaded a tender on Nov. 5th. Replication, that the defendant did not tender prior to Nov. 4th. Rejoinder, that the defendant was not liable before the 5th. Surrejoinder, that he was so liable. General demurrer and joinder. Verdict for the defendant. In *Leftley v. Mills*, 4 T. R. 170, three days were allowed on an inland bill. The rule as stated in the text is the general rule. As to the kinds of notes and bills that are not entitled to grace, see *infra*, p. 393, notes b and c.

the matter was soon regulated by statute.(b) In others, the courts adopted the rule requiring the allowance of grace on inland bills and promissory notes, as a part of the common law, without any express statutory regulations on the subject.(c)

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(b) In *Maine* and *Massachusetts*, "a note of hand is not entitled to grace unless it is expressly payable with grace,"—a *dictum* of *Parsons*, C. J., *Jones v. Fales*, 4 Mass. 245. But "when the court gave the opinion" in this case as to grace, "it was new. Gentlemen old in practice understood that we had adopted the English law as to this, as we had the other parts of that law in regard to negotiable contracts." 1 Dane, Abr. 413, § 7. In *Maine*, foreign bills were always entitled to grace, but inland bills and promissory notes, by a statute passed in 1824, only when "discounted at any bank, or left there for collection." *Pickard v. Valentine*, 13 Maine, 412; *McDonald v. Smith*, 14 id. 99; *Central Bank v. Allen*, 16 id. 41. A note payable at a bank, but not discounted or left there for collection, was not entitled to grace in 1837. *Buck v. Appleton*, 14 id. 284. But now, by R. S. 1837, p. 273, grace is allowed on "any promissory note, inland bill of exchange, draft, or order for the payment of money, payable in this State at a future day, or at sight, and not on demand." In *Massachusetts*, in 1824, a statute was passed allowing grace on bills of exchange payable within this State at sight or at a future day certain; and on promissory negotiable notes, orders, and drafts, payable within this State at a future day certain, in which there is not an express stipulation to the contrary. Bills of exchange, notes, or drafts, payable on demand, are expressly excepted from the foregoing provisions. Gen. Stat. 1860, p. 294. In *Ohio*, upon notes payable at banks, and upon commercial bills of exchange, it is a well-established usage to allow days of grace. In relation to mere ordinary notes of hand, no such usage is understood to prevail. *Sharp v. Ward*, 7 Ohio, 223 (1835); *Isham v. Fox*, 7 Ohio State, 317. But by a statute passed in 1839, grace was allowed on all bonds, notes, or bills made negotiable by statute. R. S. 1854, p. 576. In an act passed in 1857, "all bonds, notes, or bills, payable at a day certain, after date or after sight, made negotiable," are entitled to grace. Laws of 1857, p. 76. In *North Carolina*, grace was allowed, except between the original parties. *Jurvis v. McMain*, 3 Hawks, 10 (1824). See *State Bank v. Smith*, 3 Murphey, 70. By statute passed in 1848, "all bills of exchange payable within the State, at sight, or at a future day certain, in which there is no express stipulation to the contrary," are entitled to grace. Bills, notes, and drafts, on demand, are excepted. Rev. Code, 1855, p. 111. In the *Territory of Arkansas*, in *McLain v. Rutherford*, Hempst. C. C. 47 (1827), it was held, that "the custom of merchants (as to days of grace) does not apply to the maker and the payee"; in *Cook v. Gray*, id. 84 (1829), that "days of grace do not attach to promissory notes."

(c) In *Alabama*, grace was allowed in 1824 on a promissory note. *Crenshaw v. M'Kiernan*, Minor, 295. The first statute on the subject was passed in 1828. Now, "bills of exchange, and promissory notes, payable in money, at a bank, or at private banking-houses, are governed by the general commercial law." "All other instruments, payable in money, at a bank or private banking-houses, are governed by the commercial law, as to days of grace, protest, and notice. No days of grace are allowed on any contract except those enumerated." Code, 1852, p. 317.

In *Arkansas*, in 1838, a statute was in force, enacting that "the remedy on bills, foreign and inland, and on promissory notes or obligations payable in bank, shall be governed by the rules of the law merchant, as to days of grace, protest, and notice." Dig. of Stat. 1858, p. 211. There is no reported case on the subject prior to 1838.

In *California*, by an act passed in 1851, grace "shall be allowed, except on sight bills

Most, if not all, commercial countries now require, as a matter of strict right, the days of grace, which are added to the time that a note or bill has to run. Chief Justice Marshall declared that the allowance of days of grace is a usage which pervades

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or drafts." Woods, Dig. 1857, p. 74. There is no reported case on the subject prior to this time.

In *Connecticut*, "by the immemorial custom of merchants, sanctioned by judicial decisions, notes and bills payable at banks are entitled to grace." *Swift, C. J., Shepard v. Hall*, 1 Conn. 329 (1815). So on all negotiable promissory notes and bills. *Norton v. Lewis*, 2 id. 478 (1818). The only statute respecting grace is with regard to holidays.

In *Delaware*, grace was recognized as early as 1832. *Bank of Wilmington v. Cooper*, 1 Harring. 10. The only statute on the subject is one denying grace to "checks, notes, drafts, or bills, payable without time or at sight." Rev. Code, 1852, p. 183.

In *Florida*, grace was allowed on a promissory note in 1847. *Spann v. Baltzell*, 1 Fla. 301. There is no statute.

In *Georgia*, the only act on the subject denies grace to sight bills and drafts, and specifies certain days as holidays. R. S. 1857, p. 278.

In *Illinois*, in the absence of any statute, grace was allowed on a bill of exchange in 1858, on the ground that the law merchant was part of the common law of the State. *Cook v. Renick*, 19 Ill. 598.

In *Indiana*, grace was allowed in 1820, in *Piatt v. Eads*, 1 Blackf. 81, where it expressly appeared that there was no statute. By an act passed in 1849, "on all bills of exchange, payable within this State, whether sight or time bills, three days of grace shall be allowed." R. S. 1852, p. 379.

In *Iowa*, grace was allowed in 1841, on a promissory note without any express statute. *Hudson v. Matthews, Morris*, 94. "Three days of grace are allowed on bills of exchange, according to the custom of merchants, but not on any other instruments; and a demand at any time during the three days of grace will be sufficient for the purpose of charging the indorser." Code, 1851, p. 150. But by an act passed in 1853, "grace shall be allowed upon bills and notes executed and payable within this State, according to the principles of the law merchant, and notice of non-acceptance or non-payment, or both, of said instruments, shall be required according to the rules and principles of the commercial law." Laws of 1853, p. 188. Revision of 1860, p. 320. The act of 1853 repeals the provisions of the Code, so that a demand on the first day of grace is premature. *Edgar v. Greer*, 8 Clarke, 394.

In *Kentucky*, grace was allowed in 1848. *Strader v. Batchelor*, 8 B. Mon. 168. There is no statute.

In *Louisiana*, by a statute passed in 1805, "instead of the ten days of grace which have been heretofore allowed, three days only shall be hereafter allowed." Dig. 1828, Vol. I. p. 93. "Upon all bills of exchange and promissory notes made negotiable by law, or by usage and custom of merchants in this State, three days of grace shall be allowed." R. S. 1856, p. 46.

In *Maryland*, in an action by an indorsee against the maker of a note, dated September 19th, payable at twelve months, the writ was served on the defendant September 20th, and the plaintiff recovered. *Ponsonby v. Nicholson*, 4 Harris & M. 72. This was decided in 1797, and no reasons are given. But in *Beck v. Thompson*, 4 Harris & J. 531 (1819), a count in a declaration on a promissory note was held bad, because it alleged a demand, without allowing for grace, "three days before the note became

the whole commercial world. In the same case he said that it was universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract, that the bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace; and a

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due, according to the established rule of law." *Martin, J.* See *Jackson v. Union Bank*, 6 Harris & J. 146; *Flack v. Green*, 3 Gill & J. 474. There is no statute.

In *Michigan*, a statute in the same terms as that of Massachusetts, *supra*, p. 393, note b, was in force as early as 1838. *Comp. Laws*, 1857, p. 408. There is no reported case on the point prior to that time.

In *Minnesota*, a statute similar to that in Massachusetts was in force in 1858, *Stat.* 1858, p. 376, prior to any reported case on the subject.

In *Mississippi*, grace was allowed in 1842, in *Fleming v. Fulton*, 6 How. Miss. 473, where it was contended that only foreign bills were entitled to it, and that four days was the proper time; but both objections were overruled. But in *Harrel v. Bixler, Walker*, 176, where a suit was brought on a note by the indorsee against the indorser, it was held that the defendant was not entitled to grace. There is no statute.

In *Missouri*, grace was allowed on a promissory note in 1823, in *Schlatter v. Rector*. 1 Misso. 286. The only statute on the subject is one prohibiting grace on bills at sight.

In *New Hampshire*, in *Leavitt v. Simes*, 3 N. H. 14, *Richardson, C. J.* said, with reference to a promissory note, that it was well settled that the demand ought to be made on the last day of grace. It appeared, in this case, that four out of the five banks in Portsmouth, in one of which the note in suit had been left for collection, were in the habit of allowing grace. This decision was rendered in 1823, and in 1828 a statute was passed enacting that "no bill of exchange, negotiable promissory note, order, or draft, except such as are payable on demand, shall be payable until days of grace have been allowed thereon, unless it appear in the instrument that it was the intention of the parties that days of grace should not be allowed." *Comp. Stat.* 1853, p. 460.

In *New Jersey*, in *Ferris v. Saxton*, 1 Southard, 1, 17 (1818), *Kirkpatrick, C. J.* said that it was well settled that the day on which a note became due was on the third day of grace. The only statute relates to holidays.

In *New York*, grace was mentioned in *Leffingwell v. White*, 1 Johns. Cas. 99 (1799); and in *Corp v. M'Comb*, id. 328 (1800), the court say, that "notice to the indorser on the third day of grace, after a demand made of the maker, and his default of payment, is good." The only statute refers to holidays.

In *North Carolina*, "All bills of exchange payable within the State, at sight, or at a future day certain, in which there is no express stipulation to the contrary, shall be entitled to days of grace, as the same are allowed by the custom of merchants on foreign bills of exchange, payable at the expiration of a certain period after date or sight: Provided, that no days of grace, shall be allowed on any bill of exchange, promissory note, or draft, payable on demand." *Rev. Code*, 1854, p. 111.

In *Oregon*, the provisions of the Massachusetts statute were in force as early as 1855, prior to any reported case. *Stat.* 1855, p. 531.

In *Pennsylvania*, it was adopted as early as 1792. *Bank of North America v. M'Knight*, 1 Yeates, 145. The only statute denies grace to bills at sight.

In *Rhode Island*, in *Cook v. Darling*, 2 R. I. 385, it was contended that the note in suit was not entitled to grace, because not payable at a bank; but the court overruled the objection, and allowed the grace. There is no statute on the subject, except one with regard to holidays and one denying it to bills at sight.

demand of payment previous to that day would not authorize a protest, or charge the drawer of the bill. (d) The number of days throughout the United States and England (e) is three; and the presumption in all cases would be that that is the number to be allowed. (f) A usage formerly prevailed in the banks of the Dis-

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In *South Carolina*, grace was adopted in 1818, in *Lovel v. Wartenburgh*, 1 Nott & McC. 83. There is no statute.

In *Tennessee*, grace was recognized in 1823, in *Broddie v. Searcy*, Peck, 183. The only statute denies grace to bills at sight, and refers to holidays.

In *Texas*, by an act passed in 1848, three days were allowed on "all bills of exchange and promissory notes, assignable and negotiable by law, provided this shall extend only to contracts between merchant and merchant, their factors and agents." Hartley, Dig. 1850, p. 773. There is no reported case on the subject of grace prior to this statute.

In *Vermont*, in *Nash v. Harrington*, 2 Aikens, 9 (1826), the court decided to "adopt the law merchant touching the necessity of demand upon the maker and notice back to the indorser, in order to charge him. The point was raised, as to the adoption of grace, in *Ripley v. Greenleaf*, 2 Vt. 129 (1829), but not decided, as the counsel had agreed that it should be allowed. By a subsequent act, "all bills of exchange, drafts, and promissory notes," executed or payable in that State, are entitled to grace. Contracts payable on demand, or in any other way than money, are excepted. By an act passed in 1850, contracts payable at sight are excepted. Comp. Stat. 1850, p. 443.

In *Virginia*, there is no statute.

In *Wisconsin*, a statute similar in its terms to that of Massachusetts was in force as early as 1849. R. S. 1858, p. 409. Prior to this time there is no reported case on the subject.

(d) *Marshall, C. J.*, *Bank of Washington v. Triplett*, 1 Pet. 25. Notes and bills on demand should be excepted. In *Savings Bank of New Haven v. Bates*, 8 Conn. 505, *Bissell, J.* said: "It is too well settled to admit of dispute, that, in regard to negotiable notes, the days of grace make a part of the original contract. Such a note, payable by the terms of it in sixty days, is, in law, a note payable in sixty-three days. Before the expiration of that time, no demand of payment can be made, and if negotiated on the sixty-first or sixty-second day, it is not negotiated when overdue." See also *Thomas v. Shoemaker*, 6 Watts & S. 179, *Kennedy, J.* In *Cook v. Darling*, 2 R. I. 385, it was held that all negotiable promissory notes, whether payable at a bank or not, are entitled to grace, unless there is a usage to the contrary; and the burden of proving such usage is upon the party attempting to set it up. In *Dollfus v. Frosch*, 1 Denio, 367, it was held that commercial paper payable in France on a day certain will, in the absence of any proof respecting the law of that country, be considered as payable on the third day of grace.

(e) The same is true of Scotland, Wales, and Ireland. Chitty on Bills, 10th ed., London, p. 259.

(f) *Wood v. Corl*, 4 Met. 203. *Shaw, C. J.* said: "Another ground of defence was, that it does not appear that, by the law of Ohio, three days of grace are allowed; and therefore it is not shown that a demand on the third day was right. But we consider it well settled that, by the general law merchant, which is part of the common law, as prevailing throughout the United States, in the absence of all proof of particular contract or special custom, three days of grace are allowed on bills of exchange and promissory notes; and when it is relied upon that, by special custom, no grace is



trict of Columbia, not to make a demand of notes discounted by them, or left with them for collection, until the day after the last day of grace, thus allowing four days; (g) but this custom has since been changed so as to conform to the general commercial usage of demanding payment on the third day.(h). It was like-

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allowed, or any other term of grace than three days, it is an exception to the general rule, and the proof lies on the party taking it." So also *Dollfus v. Frosch*, 1 Denio, 367, *supra*, note d; *Lucas v. Ladew*, 28 Misso. 342. But in *Goddin v. Shipley*, 7 B. Mon. 575, a contrary doctrine would seem to be laid down by *Marshall, C. J.*, who said: "The note was presented three days after the expiration of the time mentioned for payment, and probably on the last day of grace. But the number of days of grace is fixed by the local law, and not by the law merchant, which refers it to the law or usage of the place or country where the instrument is payable. And there is no evidence of the law of Missouri on this subject, none at least which would authorize the court to withdraw the fact from the jury." In this case, the only dispute, as to fact, was whether the note was payable in Missouri; and the judge at Nisi Prius instructed the jury to find for the plaintiff, if they believed that the note was payable in Missouri. He must have acted on the presumption that the days of grace there were three; but this instruction was held erroneous.

(g) *Renner v. Bank of Columbia*, 9 Wheat. 581. It appears that the Bank of Columbia had adopted this practice from its establishment in 1793, and that it has been the universal custom of all the banks in Washington and Georgetown, for more than twenty years. The indorser was acquainted with it when he indorsed the note, and a demand on the maker at the fourth day was held sufficient to charge him. It was also held that, although the declaration does not allege the custom, yet if proof of it is admitted, without objection, a judgment for the plaintiff is not erroneous. The same points were decided in *Bank of Columbia v. Magruder*, 6 Harris & J. 172, where it was held that the proper mode of procedure, where the custom was not alleged, was by way of demurrer, on exception to the admissibility of the evidence at the trial. In *Mills v. Bank of U. S.*, 11 Wheat. 431, it was not proved that the indorser knew the usage; but *Story, J.*, after referring to the case of *Renner v. Bank of Columbia*, said: "In the present case the court is called upon to take one step further; and, upon the principles and reasoning of the former case, it has come to the conclusion, that when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not. In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable." So *Raborg v. Bank of Columbia*, 1 Harris & G. 231; *Bank of Columbia v. Fitzhugh*, *id.* 239. In *Bank of Washington v. Triplett*, 1 Pet. 25, it was held that there was no distinction in this respect between a note or bill made negotiable at a particular bank, and one that was not. In this case the bill was drawn in Alexandria on Washington; but this was held not to vary the law, as the rule respecting grace is to be governed by the usage of the place where the bill is payable. The bill had been left in the bank for collection. In *Cookendorfer v. Preston*, 4 How. 317, it was held that the usage only applied to notes discounted by the banks.

(h) *Cookendorfer v. Preston*, 4 How. 317, where it is stated that the change was made in 1818. But in *Adams v. Otterback*, 15 How. 539, it is said that the Bank of Washington has changed back again to the previous custom since the decision of *Cookendorfer v. Preston*.



wise the custom in Louisiana formerly to allow ten days; but this has been changed by statute to the regular time.(i) The number of days on the continent of Europe varies from none to fifteen, and a list of these will be found in our note.(j) The number to be allowed, in any case, and the regulations concerning them, will be governed by the law of the place where the

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(i) The statute was passed in 1805, *supra*, p. 394, note c.

(j) Altona.	Sundays and holidays included. Bills due thereon to be paid the day previous . . . . .	12 days.
Amsterdam,	abolished by Code Napoleon. . . . .	None.
Antwerp.	" " " " . . . . .	"
Austria.	None on bills at sight, demand, or less than 7 days after sight or date; bills presented after maturity to be paid within 24 hours, Sundays and holidays included, and if the last day of grace falls thereon, protest to be made the next day. . . . .	3 days.
Bahia.	See Brazil. . . . .	15 days.
Barcelona.	. . . . .	14 days.
Berlin.	Bills due on Sunday or holiday to be paid the day previous. . . . .	3 "
Bilboa.	. . . . .	14 "
Brazil.	Sundays and holidays included. Bills due thereon to be paid the day previous. . . . .	15 "
Bremen.	. . . . .	8 "
Cadiz.	. . . . .	6 "
Dantzic.	. . . . .	10 "
Denmark.	. . . . .	8 "
France.	Abolished by Code Napoleon. . . . .	None.
Frankfort-on-the-Main.	Sundays and holidays not included. None on bills at sight. . . . .	4 days.
Geneva.	. . . . .	5 "
Genoa.	Abolished by Code Napoleon. . . . .	None.
Germany.	. . . . .	8 days.
Gibraltar.	. . . . .	14 "
Hamburg.	Same as Altona. Called respite days. . . . .	12 "
Leghorn.	. . . . .	None.
Leipsic.	. . . . .	"
Lisbon.	6 days on local; 15 on foreign bills. Bills not accepted to be paid the day they fall due. . . . .	6 or 15 days.
Madrid.	. . . . .	14 "
Malta.	. . . . .	13 "
Naples.	Abolished by Code Napoleon. . . . .	None.
Oporto.	Same as Lisbon. . . . .	6 or 15 days.
Palermo.	. . . . .	None.
Rio de Janeiro.	Same as Brazil. . . . .	15 days.
Rotterdam.	Abolished by Code Napoleon. . . . .	None.
St. Petersburg.	On bills payable after date, 10 days; at sight, 3 days; at any time after sight, none; on bills presented after maturity, 10 days. Sundays and holidays and the day the bill falls due included; on which days no protest can be made, but payment must be demanded the morning of the last day of grace, and protest made before sunset. Vary from 10 days to none	

note or bill is payable; (*k*) though, as has been seen, the presumption is that three days are allowed, and the burden of proof to show that, by the usage or law of the place of payment, no grace at all, or any number of days other than three, is allowed, is upon the party seeking to avail himself of it. (*l*) As grace was itself originally dependent upon, and had its origin in usage, it would seem that evidence of usage should be admissible, in any case, either to lengthen (*m*) or to shorten (*n*) the number of days, although the courts in New York at one time seem to have been inclined to exclude such evidence, as tending to control the settled law with respect to negotiable paper. (*o*) One exception,

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Spain.	Varying; generally 8 on inland, and 14 on foreign bills. But see Cadiz. Bills payable at sight, or at a fixed date, or unaccepted before maturity, not entitled.	Vary from 6 to 14 days.
Sweden.		6 "
Trieste.	Same as Austria.	3 "
Venice.	Sundays, holidays, and days when banks are shut, not included.	6 "
Vienna.	Same as Austria.	3 "

(*k*) *Bank of Washington v. Triplett*, 1 Pet. 25; *Dollfus v. Frosch*, 1 Denio, 367; *Bowen v. Newell*, 3 Kern. 290, 2 Duer, 584. This case arose on a check made in New York and payable in Connecticut. By the law of the former State grace is allowed, by the latter, not. Held, that the check was not entitled to grace. On the first trial of this case, as reported in 5 Sandf. 326, evidence of the usage of banks in Connecticut not to allow grace was admitted, and held to govern the question whether grace should be allowed. This was reversed in the Court of Appeals, in 4 Seld. 190, where it was held that the evidence was inadmissible to control the rules of law in relation to such paper. But on the next trial, as reported in 2 Duer, 584, the usage, being found general, was admitted, and this was affirmed on appeal, in 3 Kern. 290. It seems somewhat difficult to reconcile these cases. See *infra*, note *o*. *Martin, J., Vidal v. Thompson*, 11 Mart. La. 23; *Goddin v. Shipley*, 7 B. Mon. 575; *Lucas v. Ladew*, 28 Misso. 342; *Ripley v. Greenleaf*, 2 Vt. 129; *Bryant v. Edson*, 8 id. 325. In this case, A, of Massachusetts, made a note there, payable to B, of New Hampshire. B brought the note to Vermont, and C, of Vermont, signed it as a joint maker. The note was dated in Massachusetts. By the laws of New Hampshire and Massachusetts, the note was entitled to grace; by the law of Vermont, not. Held, that the note was to be considered as made and payable in Massachusetts.

(*l*) *Supra*, p. 396, notes *d* and *f*.

(*m*) See the cases cited *supra*, p. 397, note *g*, as to the custom of banks in the District of Columbia to allow four days.

(*n*) See *supra*, p. 396, notes *d* and *f*; *Kilgore v. Bulkley*, 14 Conn. 362, where *Storrs, J.* said: "The question how far evidence of usage is admissible to show that, as to a particular species of negotiable paper, it is entitled, not to the usual number of days of grace allowed by the general law, but to a greater or less number, has received the most deliberate consideration of our courts of the highest authority, especially on commercial questions, and is most explicitly and decisively settled." *Bowen v. Newell*, 3 Kern. 290, 2 Duer, 584; *City Bank v. Cutter*, 3 Pick. 414, *infra*, p. 402, note *z*.

(*o*) *Woodruff v. Merchants' Bank*, 25 Wend. 673, where *Nelson, C. J.* said: "The

however, to this rule, is, that no evidence of usage can be allowed to control the terms of any statutory enactment on the subject. *(p)*

The only remnant of the idea of favor which now attaches to the days of grace is this: If a note or bill without grace falls due on Sunday, or any recognized holiday, like any other contract which is to be performed on that day, *(q)* it is not payable until the next succeeding secular day, according to the weight of authority, *(r)* because the payor cannot be compelled to do

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effect of the proof of usage, as given in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York. We need scarcely add, even if the witnesses were not mistaken, and the usage prevails there as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." This case was affirmed in 6 Hill, 174. The case of *Brown v. Newell*, 4 Seld. 190, is to the same effect. The only ground on which these cases can be sustained is that the usage was not sufficiently proved. But the courts did not seem to rest their decision on this ground. At any rate, so far as the admission of evidence of a properly established custom is concerned, they are overruled by the case of *Bowen v. Newell*, 3 Kern. 290. See *supra*, p. 399, note *k*.

*(p)* *Perkins v. Franklin Bank*, 21 Pick. 483.

*(q)* 2 Parsons on Contracts, 179.

*(r)* *Salter v. Burt*, 20 Wend. 205; *Barrett v. Allen*, 10 Ohio, 426, *Lane*, C. J. dissenting. The point was learnedly discussed, and elaborate opinions on both sides of the question given, in *Avery v. Stewart*, 2 Conn. 69, where a majority of the court, consisting of *Swift*, C. J., *Trumbull*, *Smith*, *Brainard*, *Goddard*, and *Gould*, JJ., decided that a tender on Monday of the amount due on a note payable on Sunday, without grace, was valid, *Edmond*, *Smith*, and *Hosmer*, JJ. dissenting. *Gould*, J. said: "The note in question became payable on Sunday. But payment on that day is prohibited by law. The question, then, arises, whether the tender should have been made on Saturday or Monday. It has been argued that the debtor in such a case must, at his peril, pay or tender, at all events, *within* the time appointed. It would seem to me quite as reasonable to say that he cannot, in any event, be required to pay, nor the creditor to accept payment, *before* the time appointed. It is true, as to contracts or which days of grace are allowed, that if the last of those days is Sunday, payment must be made on Saturday. But the allowance of grace was originally a mere indulgence, which it might be very reasonable to qualify with greater strictness than if it had been demandable as a matter of right. At any rate, the allowance of grace is an anomaly, and the rules resulting from it are, of course, not to be extended by analogy. Upon the whole, the doctrine which appears to me most reasonable is, that as Sunday cannot, for the purpose of performing contracts, be regarded as a day, in law; it is, as to that purpose, to be considered as stricken from the calendar, though intervening Sundays are doubtless to be counted as in all other computations of time; because they are not appointed for the *performance* of any act. And this distinction is analogous to the modes of computation under the common rule for pleading in abatement." *Hosmer*, J., in a dissenting opinion, said: "I have already observed, that the performance of the contract should be as near to the letter of it as it may be; and that it will be equally near, whether the day of payment is considered as being Saturday or Monday. The other branch of my proposition is this, that it must not include a longer period than the one which the contract expressly assumes. In other words, the party

business on such a day, nor, in the case of Sunday, is it lawful for him so to do. But if the last day of grace falls upon a holiday, the note or bill must be presented, in the absence of any statutory provisions to the contrary, on the secular day next preceding the holiday,(s) even though the note be entirely deprived

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promising must perform within the time prefixed. To enlarge the time of a contract is *jus dicere, non dare*. If the contractor has appointed a day on which to perform, when, by law, he cannot, he did it with his eyes open, with full knowledge that, unless his agreement was void from the impossibility of performance, it could not be executed on the day prefixed. What, then, is the reasonable consequence? As the party promising knew that his contract could not literally be accomplished, and as he knew, likewise, that he must perform within the limits of the time assumed, he must have expected and intended to have fulfilled it on Saturday. This, in my judgment, is the fair legal construction. If it wanted fortifying, it would derive it from the well-known maxim, — a rule of some strictness and rigor, and the last to be resorted to, — that the construction is to be most strong against the party promising." After referring to the rule, that, when the last day of grace falls upon Sunday, demand must be made on Saturday, he proceeds: "Between a negotiable note becoming due on Sunday, and a note not negotiable payable at the same time, I perceive a distinction, but no essential difference. The construction, in my opinion, should be the same in both instances. It cannot comport with public convenience that a different rule should prevail in cases so very similar. It is much preferable that there should be one uniform rule on the subject, than that a diversity should exist, which will embarrass mankind in their intercourse with each other, and may be a fruitful source of error and litigation. . . . In fine, in my judgment, one uniform rule of construction on the point under discussion is desirable. The person who promises to do an act must, at his peril, if there has no impossibility arisen posterior to the engagement, perform within the time explicitly assumed. If the contract is stipulated to be performed on Sunday, the legal construction is, that it shall be done on the preceding Saturday. This is agreeable to the usage of merchants, in respect of bills of exchange and negotiable notes, — a usage not arbitrary and founded on no reason, but bottomed on common sense and common law; and in this opinion I am more deeply confirmed, since no case has been adduced to show that a person has been allowed a period to perform in, beyond the express limitation of his contract." See also *Sands v. Lyon*, 18 Conn. 18; *Staples v. Franklin Bank*, 1 Met. 43, 47, *Shaw*, C. J. The only decision to the contrary, in the case of notes, is *Osborne v. Smith*, 14 Conn. 366, note, *infra*, p. 402, note u. But with regard to other contracts, it will be seen that there is a conflict of authority.

(s) In *Tassell v. Lewis*, 1 Ld. Raym. 743, it is said: "But if it happens that the last of the said three days is Sunday, or great holiday, as Christmas day, &c., upon which no money used to be paid, then the party ought to demand the money upon the second day; and if it is not paid, he ought to protest the bill the said second day, otherwise it will be at his own peril, for the drawer will not be chargeable." *Bussard v. Levering*, 6 Wheat. 102; *Barker v. Parker*, 6 Pick. 80; *Jackson v. Richards*, 2 Caines, 343; *Lewis v. Burr*, 2 Caines's Cas. 195; *Spencer, J., Griffin v. Goff*, 12 Johns 423; *Ontario Bank v. Petrie*, 3 Wend. 456; *Cuyler v. Stevens*, 4 id. 566; *Ransom v. Mack*, 2 Hill, 587; *Sheldon v. Benham*, 4 id. 129; *Sheppard v. Spates*, 4 Md. 400; *Offut v. Stout*, 4 J. J. Marsh. 332; *Fleming v. Fulton*, 6 How. Miss. 473; *Barlow v. Planters' Bank*, 7 id. 129; *Homes v. Smith*, 20 Maine, 264, where a demand made on

of grace by three succeeding holidays.(*t*) This question, it may be remarked, like all others connected with the subject of grace, is dependent upon the law or the usage of the place where the note or bill is to be presented.(*u*) In case the holidays intervene, they are to be treated as any other day.(*v*) Sunday has been treated as a holiday in England with respect to the days of grace on foreign bills from the time of Lord Holt,(*w*) and it has since been extended equally to inland bills and promissory notes.(*x*)

Before any statutory provisions concerning them, the fourth of July,(*y*) and Commencement-day at Harvard University in Massachusetts,(*z*) have been recognized as holidays by the courts.

Sunday itself was held a day too late, and an indorser was discharged. See *Avery v. Stewart*, 2 Conn. 69, *supra*, p. 400, note *r*.

(*t*) In *Dabney v. Campbell*, 9 Humph. 680, the last day was Sunday. Saturday was New-Year's day, and the demand was made on Friday. Neither counsel nor court made any objection to it. The case, however, which was decided for the defendant, an indorser, turned on another point.

(*u*) *Blodgett v. Durgin*, 32 Vt 361; *Kilgore v. Bulkley*, 14 Conn. 362, which was a case on a certificate of deposit which fell due by its terms on Sunday. As it was payable in New York, it was held to be governed by the law of that place, as to the proper day of presentment. Evidence was offered by the defendant to show that grace was there allowed, and by the plaintiff that it was not allowed. The evidence had been objected to. On the question whether Saturday was a proper day for presentment, the plaintiff introduced evidence of usage, and also a report of the case of *Osborne v. Smith*, 14 Conn. 369, note, decided in the Superior Court of New York city. The defendant objected to all this evidence, and introduced testimony to prove that the custom was to make the demand on Monday, and also a report of the case of *Salter v. Burt*, 20 Wend. 205, decided in the Supreme Court of New York. The jury found for the plaintiff. Held, that the evidence and decisions were properly admitted, and that the instruction given by the presiding judge, that the decision of the Supreme Court was entitled to greater weight than that of the Superior Court, but that neither was conclusive, was correct.

(*v*) See *Avery v. Stewart*, 2 Conn. 69, *supra*, p. 400, note *r*. So if the day the note is due, on its face, is Sunday. *Wooley v. Clements*, 11 Ala. 220.

(*w*) In *Tassell v. Lewis*, 1 Ld. Raym. 743, "Merchants, in evidence at a trial in Guildhall, Trin. 7 Wm. III. (1696), before *Holt*, C. J., swore the custom of merchants to be such, which was approved by *Holt*, C. J."

(*x*) *Kent*, C. J., *Jackson v. Richards*, 2 Caines, 343. It would seem always to have been so considered in the United States.

(*y*) *Lewis v. Burr*, 2 Caines's Cas. 195; *Cuyler v. Stevens*, 4 Wend. 566; *Ransom v. Mack*, 2 Hill, 587; *Sheldon v. Benham*, 4 id. 129.

(*z*) In *City Bank v. Cutter*, 3 Pick. 414, it was held that, though this day was not a legal holiday, yet a usage of any bank, in respect to notes falling due that day, to make a demand and to send notice the day previous, will bind an indorser, consant of that usage, of a note discounted for him at the bank; and whether the note was payable at the bank or not is immaterial. In this case the note was payable on that day, and a demand made the day previous. The indorser was held.

Now, in most of the States, there are statutes specifically describing holidays, and prescribing the practice with regard to them; (a) but independently of these, usage would determine whether any day was to be so regarded, and also the regulations concerning it. (b)

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(a) In *Alabama*, Sunday, Jan. 1st, and July 4th are established holidays. Code, 1852, p. 317. In *Arkansas*, Sunday, July 4th, Dec. 25th. In *California*, Sunday, Jan. 1st, July 4th, Dec. 25th. Wood, Dig., 1858, p. 74. In *Connecticut*, Sunday, July 4th, Dec. 25th, Thanksgiving and Fast days. R. S. 1854, p. 694.

In *Georgia*, Sunday, Jan. 1st, July 4th, Dec. 25th, Fast and Thanksgiving days. Cobb, New Dig., 1851, p. 522. In *Illinois*, Sunday, Fourth of July, Christmas, New Year's day. Ill. Stats., ed. 1858, p. 119.

In *Iowa*, Sunday, Jan. 1st, July 4th, Dec. 25th, Fast and Thanksgiving days. Revision of 1860, p. 320.

In *Louisiana*, Sunday, Jan. 1st, Jan. 8th, Feb. 22d, July 4th, Dec. 25th, Good Friday. These are called "days of public rest." R. S. 1856, p. 44.

In *Maine*, Sunday, Feb. 22d, July 4th, Dec. 25th, Fast and Thanksgiving days. R. S. 1857, p. 273.

In *Massachusetts*, Sunday, Feb. 22d, July 4th, Dec. 25th, Fast and Thanksgiving days. Gen. Stats. 1860, p. 294.

In *Minnesota*, Sunday, Jan. 1st, July 4th, Dec. 25th, Fast and Thanksgiving days. Stat. 1858, p. 376.

In *Missouri*, Sunday, Jan. 1st, July 4th, Dec. 25th, Thanksgiving. R. S. 1855, p. 298. In *New Hampshire*, Sunday, July 4th, Fast and Thanksgiving days. Laws of 1857, p. 187. In *New Jersey*, Sunday, Jan. 1st, July 4th, Dec. 25th. Nixon, Dig. 1855, p. 669. In *New York*, Sunday, Jan. 1st, July 4th, Dec. 25th, Fast and Thanksgiving days. R. S. 1852, p. 181.

In *Ohio*, Sunday, Jan. 1st, July 4th, Dec. 25th, Thanksgiving. Laws, 1857, p. 76.

In *Rhode Island*, Sunday, Jan. 1st, July 4th, Dec. 25th, Thanksgiving and Fast days. R. S. 1857.

In *Tennessee*, Sunday, Jan. 1st, July 4th, Dec. 25th, Fast and Thanksgiving days. Code, 1858, p. 400.

In *Vermont*, Sunday, Jan. 1st, July 4th, Dec. 25th, Fast and Thanksgiving days. Comp. Stat. 1850, p. 443.

In *Wisconsin*, Sunday, Jan. 1st, July 4th, Dec. 25th, Thanksgiving. Gen. Laws, 1860, p. 224.

In the following States the demand must be made on the business day next preceding any holiday, — Alabama, Arkansas, California, Georgia, Louisiana, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Vermont. In the following States, on the first business day next succeeding, — Connecticut, Wisconsin. In Maine, where a holiday falls on the last day of grace, demand must be made the business day next before the holiday. If on the last, and also on the second, it should be made the next succeeding business day. In Vermont, the regulations affect contracts on which no grace is allowed equally with those which are entitled to that indulgence.

(b) *City Bank v. Cutter*, 3 Pick. 414, *supra*, note z. In *Adams v. Otterback*, 15 How. 539, a bank which had been accustomed to make presentment of paper discounted on the day after the third day of grace, attempted to set up a usage to make presentment on Monday, when Sunday was the fourth day; but as the only evidence



It is settled that, if the maker is entitled to grace, the indorser has the same privilege; (c) and also that, if the indorser has the right to consider the days of grace as a part of the contract, the maker has also; (d) though an opinion seems formerly to have been entertained, that grace only applied as regards an indorser, and that the maker was liable as soon as the note fell due, according to its terms; (e) but there is no modern authority to this effect, and no usage that we are aware of.

As to the kinds of instruments entitled to grace, the rule, as supported by the weight of authority, is, that all negotiable notes and bills, except those payable on demand and those in which an intention to exclude grace is apparent on the face, are entitled to this indulgence.

There may still be some doubt with reference to bills payable at sight, for the law on this point can hardly be said to be in a satisfactory state. In England, there has been as yet no authoritative decision, though the inclination of the authorities appears to be in favor of the allowance. (f) In this country, the weight of

of this usage consisted of four instances within two years, it was held not to be sufficiently established. In *Dabney v. Campbell*, 9 Humph. 680, evidence was introduced of a usage of the banks in Memphis and Nashville to regard New-Year's day as a holiday. The judge, at Nisi Prius, charged the jury that a demand the day previous was not sufficient to charge an indorser, unless he had express knowledge of the usage, or previous dealings with the bank from which such knowledge could be inferred. Held correct, and a verdict for the defendant was sustained. The plaintiffs contended that the defendant, having dealt with the bank, was bound by the usage, whether he had knowledge or not. *Green, J.* said: "The custom proved in this case is not one by which all the notes negotiated in this bank are regulated, but it is a custom applicable to only one day in the year. In the nature of things the cases on which this usage has been acted on must be comparatively few; actual knowledge of it cannot, therefore, be reasonably inferred, even in relation to habitual dealers in the bank. But that a man who is not proved to have dealt at all with the bank heretofore shall be held bound by such usage, is to subvert altogether the original principle of the cases, and to substitute the usage of a bank as the law of the contract, in opposition to, and disregard of, the general law."

(c) *Pickard v. Valentine*, 13 Maine, 140; *Central Bank v. Allen*, 16 id. 41.

(d) *Love v. Nelson*, Mart. & Y. 237; *Hogan v. Cuyler*, 8 Cowen, 203.

(e) *Jarvis v. McMain*, 3 Hawks, 10 (1824). In both cases cited *supra*, note d, the judges at Nisi Prius instructed the juries to the same effect, but the courts above decided that the instructions were erroneous.

(f) In *Dehers v. Harriot*, 1 Show. 163, 164, note (1692), all the merchants agreed "that, if there were an acceptance, the protest must be at the day of payment; if at sight, then at the third day of grace" In *Coleman v. Sayer*, 1 Barnard. 303 (1728), one of the questions was "whether the three days of grace are allowable by the custom of London, as well where a bill is payable at certain days after sight, as well as where



authority is on the same side, but the decisions are conflicting.(g) Undoubtedly usage would determine the question in any particu-

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it is payable upon sight. The Chief Justice said the days of grace were allowable in one case as well as the other." In *Janson v. Thomas*, 3 Doug. 421 (1784), it was objected by the defendant, that the bill, which was at sight, was unstamped. It was answered, that the stamp act excluded bills on demand, and that bills at sight should come within the operation of the act. Held, for the defendant, that the bills should have been stamped. Lord *Mansfield* said: "I believe there is great doubt as to the usage about the three days' grace." *Buller*, J. said: "In a case before *Willes*, C. J. (1743), a special jury certified that, on bills at sight, three days were allowed. That was an action on an inland bill. I know that now they differ about it in the city, but in general it is taken." In *Dixon v. Nuttall*, 1 Crompt. M. & R. 307 (1834), the point arose, but the court thought it unnecessary to express any opinion upon it." In *Webb v. Fairman*, 3 M. & W. 473, 474, *Bolland*, B., interrupting counsel, said: "In the case of a bill payable at sight, it has been decided over and over again, that the holder cannot sue upon it until after the expiration of the third day after sight."

(g) The cases allowing grace are *Hart v. Smith*, 15 Ala. 807, where *Dargan*, J. said: "I am free to confess that my opinion, untrammelled by authority, would incline me to hold that a bill of exchange, payable at sight, is not entitled to days of grace." But after citing the English authorities, and the opinions of text-writers, adds: "Under the influence of these authorities I feel constrained to hold that a bill payable at sight is entitled to days of grace." *Lucas v. Ladew*, 28 Misso. 342. In *Nimick v. Martin*, 1 Monthly Law Mag. 15, 17 West. Law J. 380, *Strawbridge*, J. said: "On the abstract question, I have not now, nor have I for thirty years, had the least doubt." He then cites the opinions of Kent, Bayley, and Chitty with approbation, and adds: "If we were at liberty to examine into the reason of the thing, it would seem much stronger in favor of a sight draft than of one at sixty days or six months, where all reason fails." *Contra*, *Trask v. Martin*, 1 E. D. Smith, 505, *Ingraham*, J. dissenting. *Woodruff*, J., delivering the opinion of the court, said: "However such allowance originated, whether in the indulgence of the holder or otherwise, it became at last the *right* of the drawee. But it is in *contradiction* of the terms of the bill, and a departure from its plain import. So far as the usage allowing such departure has ripened into law, so far as this departure has been recognized and approved, so far, and so far only, should it prevail against the otherwise obvious meaning of the language. The *language* of a bill of exchange payable at sight requires that it should be paid when exhibited to the drawee. Is it payable according to its purport, or does that usage, which has now become *law*, embrace such a bill, and alter its otherwise legal meaning? *Prima facie*, as already remarked, the language of the bill should govern. This rule of construction is applicable as much to commercial contracts as to any others. If the language is to be controlled and modified by usage, it may be, 1st, by a usage so ancient and so universal as to form a part of the general law applicable to the subject, or, 2d, as usage of a particular place, uniform within its limits, creating an exception to the general rule, and to be ascertained by inquiry and proof. . . . Nothing, therefore, can be inferred respecting bills payable *at sight* from the conceded fact that bills payable *after sight* or after date, or at a future day, have days of grace, so long as it is no less clearly settled that bills payable on demand, or without any day of payment named therein, have no days of grace. On the contrary, if analogy furnished any guide, we should say that the terms 'at sight' no less decidedly indicated *on the very instant*, than 'on demand,' and there would seem to be no more reason for allowing days of grace in the one case than in the other." The judge

lar case, and it has been so held.<sup>(h)</sup> The opinion of some of the older writers was for the exclusion of grace,<sup>(i)</sup> but this is not so with the majority of modern authors who have treated of the subject.<sup>(j)</sup> In many of the States statutes have been passed,

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goes on then to state that the case had been argued entirely apart from any local usage in New York, and that the general usage with reference to bills at sight was so uncertain, and its recognition so doubtful, that it could not be taken to contradict the import of the language of the bill itself. The cases cited *supra*, p. 404, note *f*, were criticised, and their authority denied. The opinions of the text-writers were commented upon at length, and the authority of Beawes and Kyd especially relied upon. He then adds: "My conclusion is, that the language of the instrument, in the absence of any settled legal principle modifying its import, must govern the court in determining its meaning and effect. And that there is no known recognized usage which the court, as a matter of law, can say has given to such bills the allowance of days of grace." So far as the reason of the thing is concerned, we should be inclined to adopt the opinion of *Strawbridge, J.*, cited above. It has been stated that grace probably had its origin in the fact that the goldsmiths, who were the early bankers, used to make their payments in bars of gold and silver, and often would require some time in order to have a sufficient weight at the place of payment to meet the demand. This of course would apply with all the more force to those bills the time of whose presentment was uncertain, as is the case with bills at sight; so that whenever a goldsmith stipulated that a bill should first be shown to him, he also stipulated that a reasonable time should be allowed him within which to prepare to meet it. With respect to analogy, it is clear that, granting there is a difference between a sight bill and one on demand, the former bears a closer resemblance to a bill at one day's sight, which is without any doubt entitled to grace, than the latter, which is not. The distinction between these two kinds of instruments has always been clearly defined, and one objection to the decision in *Trask v. Martin* is, that it tends to obliterate the line which has been drawn between them. With regard to the criticisms on the English authorities, although it will be conceded that none of them is authoritative, yet they are all evidence to show what the custom of merchants formerly was; and the opinion of "all the merchants" in the case in Shower, of the "special jury" in the case tried before *Miller, C. J.*, is certainly entitled to great weight on this point. As regards the contradiction of the language of the bill, it would seem that this argument might have been used with greater force at the early period in the law of notes and bills than at present, and that, instead of being necessary to show by usage that a note or bill is entitled to grace, it would seem to be more in accordance with the spirit of modern law, as stated in the cases cited *supra*, p. 396, notes *d* and *f*, that the burden of proof is upon the party seeking to deprive any kind of negotiable instrument of grace, to prove either a usage or law to that effect. If this were not so, it is conceived that grace could never be allowed, except on paper which is already entitled to it.

(*h*) *Strawbridge, J.*, *Nimick v. Martin*, 1 U. S. Monthly Law Mag. 15, 7 West. Law Journ. 380, in the District Court of New Orleans, Nov. 1849.

(*i*) Beawes, pl. 252, 256; Glen, 119, citing Lav. tom. 1, liv. 3, c. 5; Scarlett, C. 16, R. 8; Johnson, 9; Jousse de l'Ordonnance 1673, 78; Kyd, 10; Pothier, 172.

(*j*) Bayley, 293 (Am. ed. 1836); Byles, 162, says: "The weight of authority has been considered to incline in favor of such allowance." Chitty, 258, 261, 10th Lond. ed.; Edwards, 523; Forbes, 142; 3 Kent, Com. 102; Selw. N. P., Bills of Exch. 6; Smith,

owing to the uncertainty of the law; some of them admitting, *(k)* others excluding grace. *(l)*

Grace has never been extended to notes and bills on demand, *(m)* but there are statutory regulations concerning this also in several States. *(n)*

If a note be payable by instalments, the days of grace are allowed on each instalment. *(o)* A note payable the first day of May, "fixed," has been held not entitled to grace, the signification of the word "fixed" being construed to be "without grace." *(p)* This meaning has not been applied to the words "without defalcation." *(q)*

A bank-check ordinarily is not entitled to grace; but whether it is entitled to the allowance or not when post-dated, or when its terms are the same with those of a bill of exchange, is yet unsettled, the authorities being in a state of conflict. *(r)* Grace has been allowed on bank post-notes, *(s)* and there seems to be no rea-

Merc. Law, 249, 5th Lond. ed.; Story on Bills, § 342; Viner, Abr., Bills of Exch. B. Thompson expresses no opinion. So 1 Bell, Com. 416.

*(k)* Alabama, Arkansas, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina, Ohio, Oregon, South Carolina, Texas, Wisconsin. See *supra*, p. 393, notes *b, c*.

*(l)* California, *Minturn v. Fisher*, 4 Calif. 35; Delaware; Georgia, *Freeman v. Ross*, 15 Ga. 252; Missouri, *Lucas v. Ladew*, 28 Misso. 342; New York; Pennsylvania, Laws of 1857, p. 630; Rhode Island, R. S. 1857, p. 278; Tennessee, Code, 1858, p. 400, Vermont. See *supra*, p. 393, notes *b, c*.

*(m)* *Camner v. Harrison*, 2 McCord, 246; *Smith v. Bythewood*, Rice, 245; *Luckey v. Pepper*, Morris, 490. See *Freeman v. Ross*, 15 Ga. 252; *Cowen, J., Harker v. Anderson*, 21 Wend. 372; *Woodruff v. Merchants' Bank*, *Nelson, C. J.*, 25 id. 673; *Parke, B., Oridge v. Sherborne*, 11 M. & W. 374.

*(n)* In the following States grace is expressly denied by statute, to notes and bills on demand: Maine, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina, Vermont, Wisconsin. See *supra*, p. 393, notes *b, c*.

*(o)* *Oridge v. Sherborne*, 11 M. & W. 374. See *Carlton v. Kenealy*, 12 id. 139.

*(p)* *Durnford v. Patterson*, 7 Mart. La. 460, where the opinion of Febrero is cited to show that "fixed" means "without grace," and that of Jousse, that it is superfluous.

*(q)* *McDonald v. Lee*, 12 La. 435.

*(r)* *Infra*, chapter on Checks.

*(s)* *Sturdy v. Henderson*, 4 B. & Ald. 592; *Staples v. Franklin Bank*, 1 Met. 43; *Perkins v. Franklin Bank*, 21 Pick. 483. These last two cases were decisions under a statute which provides that on all promissory negotiable notes payable at a future day certain, in which there is not an express stipulation to the contrary, grace shall be allowed; but as this appears to be nothing more than an enactment of or recognition of the common law on the subject, the authorities would apply equally where there are no statutory provisions.

son why the same should not be applicable to certificates of deposit payable on time; but the law with reference to this last kind of instrument is yet unsettled.*(t)* Whether notes payable to a particular person without the words "or order," are entitled to grace or not, is likewise unsettled.*(u)* A similar uncertainty exists as to sealed notes.*(v)* The maker may stipulate that a note or bill shall be paid without grace. Such a stipulation may be in any form of words which convey the idea that the instrument is to be payable without grace, as by using the words in the body or on the margin "without grace," "no grace," "free of grace," or any other circumlocution which would indicate to the holder that it is payable on the day fixed.*(w)*

So in the case of an acceptance, where it is apparent from the terms of the writing that the acceptor in designating the day of payment intended to include the days of grace, the day mentioned is the peremptory time for presentment, without any additional allowance. Thus, where a bill at sixty days' sight is accepted September 14, payable November 16, the demand must be made on this last date in order to charge a drawer or indorser; if made three days later, he would be discharged.*(x)* The words, however, to have the effect of cutting off the days of grace, should fairly express that intent without ambiguity.*(y)*

With regard to the method of computing the time, as has

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*(t)* See *Kilgore v. Bulkley*, 14 Conn. 362, *supra*, p. 402, note *u*.

*(u)* Grace is allowed in England, the note being considered a negotiable one within the statute of Anne. *Smith v. Kendal*, 1 Esp. 231, *nom. Smith v. Kendall*, 6 T. R. 123. Such would probably be the rule in New York. *Downing v. Backenstoos*, 3 Caines, 137; *Goshen & Minisink Turnp. Road v. Hurin*, 9 Johns. 217; *Dutchess Cotton Manuf. v. Davis*, 14 Johns. 238. But in Connecticut such a note, not being considered negotiable within the statute of that State, is not entitled to grace. *Avery v. Stewart*, 2 Conn. 69; *Backus v. Danforth*, 10 Conn. 297.

*(v)* In *Love v. Nelson*, Martin & Y. 237, it was held that a sealed note was entitled to grace. But the contrary was held in *Jarvis v. McMain*, 3 Hawks, 10, and *Fields v. Mallett*, 3 Hawks, 465. In both North Carolina and Tennessee, where these cases were decided, sealed notes are put on the same footing as others by statute.

*(w)* *Shaw, C. J.*, *Perkins v. Franklin Bank*, 21 Pick. 483.

*(x)* *Kenner v. Creditors*, 19 Mart. La. 540, 20 id. 36, 1 La. 120. And if there is no date to the acceptance it may be shown by parol. *Ibid*.

*(y)* See *supra*, p. 407, notes *p*, *q*. In *Perkins v. Franklin Bank*, 21 Pick. 483, the note, dated December 7th, 1836, was payable in seven months, with interest "until due and no interest after." On the margin were written the words, "Due July 7th, 1837." It was contended that this amounted to a stipulation that there should be no grace but the court held otherwise.

already been remarked,(z) the date is always excluded. Thus, in case of a note dated January 1st, payable in one month, excluding the date, and including the last day of the month, the note would be demandable, without grace, on February 1st, and with grace, counting this date as the first day, demand should be made on February 4th.

The same method is used in computing the time when the note is payable at a certain number of days after sight or date. Thus, in case of a note dated June 1st, payable at ten days after date, excluding the date, the note would be payable June 11th. Adding the three days of grace, the note would be payable June 14th, and payment should be demanded on that day.

Where a note is payable at a fixed date, as October 1st, the days of grace are simply added, and consequently the demand in such case must be made on October 4th. As we have already seen,(a) the word "month" in the law of notes and bills always means a calendar month, and no allowance is to be made for their different lengths. But where a note is made on the last day of one month which has a corresponding day in the month when the note is due, the day after this corresponding day is to be considered as the first day of grace. Thus, where a note is dated September 30th, payable in one month from date, it must be demanded November 2d.(b) Where a note is dated on the last day of a month which has no corresponding day in the month when it is due, the doctrine of *cy-pres* (or "as near as may be") applies, by which the last day in the latter month is taken, as the nearest approximation, for the day before the first day of grace. Thus, a note for one month, dated January 28th, 29th, 30th, or 31st, must in ordinary years be demanded on March 3d; and in leap years, if it is dated January 28th, it must be demanded on March 2d, because in such case there is a day in February corresponding to the day of the month on which the note was made.(c) If a note has an impossible date, as September 31st, where the time of delivery is not shown, the note is considered as dated on the last day of the month, which

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(z) *Supra*, p. 385, note v.

(a) *Supra*, p. 384, note s.

(b) See *Wagner v. Kenner*, 2 Rob. La. 120.

(c) See *Wagner v. Kenner*, 2 Rob. La. 120; where 6 Dalloz, Jur. du Roy., tit. *Effets de Comm.*, § 4, 2, is cited and approved; *Wood v. Mullen*, 3 Rob. La. 395.

in the case supposed would be September 30th ; and, if payable at six months from date, has been held demandable on April 2d.(*d*) The precise day upon which a note or bill falls due and is payable need not be averred in the declaration. It is sufficient to state a presentment at the time of maturity according to the tenor and effect of the instrument.(*e*) But if, on comparison of its terms and the time as stated under a videlicet, the latter happens to be erroneous, it may be rejected as surplusage, and the declaration will still be good.(*f*)

Where by special custom a demand may be made on any other day than the third day of grace, such custom should be averred and proved.(*g*)

A question has arisen, whether the maker of a note is liable to be sued before the expiration of the last day of grace, and the decisions are conflicting. In some States it has been held that a suit brought on the third day was premature, the courts there adopting the general rule with reference to other contracts, that, where a day is appointed for the payment of money, the payor has the whole of the day down to the last moment in which to tender the money.(*i*) But many courts have made a distinction in

(*d*) *Wagner v. Kenner*, 2 Rob. La. 120, where a demand, on April 3d, was held too late, and the indorser was discharged.

(*e*) *Bynner v. Russell*, 7 J. B. Moore, 266.

(*f*) *Bynner v. Russell*, 7 J. B. Moore, 266, where the declaration averred a presentment of a bill when it "became due and payable according to the tenor and effect thereof, to wit, on March 31st, 1822." A special demurrer, assigning for cause that March 31st was Sunday, was overruled, and judgment entered for the plaintiff. So, "to wit, on June 2d, 1848," when the note was payable May 5th. *Frank v. Townsend*, 9 Humph. 724. In this last case the defendant pleaded *non assumpsit*. In *Wells v. Woodley*, 5 How. Miss. 484, the averment was, "to wit, on Feb. 28th," when the note was payable Jan. 29th. Held sufficient, after judgment by default.

(*g*) *Jackson v. Henderson*, 3 Leigh, 196.

(*i*) Lord *Kenyon*, C. J., *Leftley v. Mills*, 4 T. R. 170 ; *Wiggle v. Thomason*, 11 Smedes & M. 452 ; *Walter v. Kirk*, 14 Ill. 55. In *Randolph v. Cook*, 2 Port. Ala. 286, the point decided was, that the defendant might take advantage of the fact that suit was brought on a note before it was due, by writ of error, after appearance and judgment by *nil dicit*. The counsel for the plaintiff did not object that the suit was prematurely brought, but only that the objection was taken too late. The court said that it was unnecessary to examine the question whether the suit was premature or not. But in a previous case, *Crenshaw v. M'Kiernan*, Minor, 295, *Crenshaw*, J. said : "I take it to be a correct doctrine, that, if payment is refused when a note or bill is presented on the day of payment, the holder is not bound to wait until the last moment of that day, but may forthwith give notice, and take any requisite step to make the drawer and indorser liable." In *Wiggle v. Thomason*, 11 Smedes & M. 452, it was held that



reference to negotiable notes and bills, (j) resting upon two reasons. One is, that a protest, which can clearly be made on the third day, presupposes a default in payment, and if there has been such default in the maker, the right of action must be considered as having accrued at that time. (k) Another reason given is, that grace was originally a matter of indulgence, and might be shortened, while in ordinary contracts it has always been the right of the payee to make a tender at the last moment of the day specified. (l)

The same question has been similarly decided with reference to the liability of an indorser, there being no distinction between the two classes of cases in this respect. (m) One objection which

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the maker could not sue till after the third day, and *Love v. Nelson*, Mart. & Y. 237, is cited as an authority. The head note in this case lays down the same doctrine, but nothing of the kind was decided. The decision is, that, in Tennessee, the maker of a sealed note is entitled to grace. In *Thomas v. Shoemaker*, 6 Watts & S. 179, the last day of grace was Sunday. An action brought on Saturday was held premature. See *Bank of Utica v. Wager*, 2 Cowen, 712, 766, *Savage*, C. J. In *Osborn v. Moncure*, 3 Wend. 170, it was held that the maker is not liable before the expiration of the third day, and if he is sued before that time, that advantage may be taken of the error by nonsuiting the plaintiff. In *Hopping v. Quin*, 12 Wend. 517, it was held that an attorney could not recover of a client costs or money advanced in a suit on a note brought on the last day of grace. *Savage*, C. J. said: "It was the duty of the plaintiff to have known that a suit could not be brought on the last day of grace, and his bringing such suit must be imputed either to negligence or ignorance; in either case it lays no foundation for an action against his client, who has been the sufferer."

(j) The cases which decide that a maker may be sued before the end of the third day are *Wilson v. Williman*, 1 Nott & McC. 440; *McKenzie v. Durant*, 9 Rich. 61; *Coleman v. Ewing*, 4 Humph. 241; *Greeley v. Thurston*, 4 Greenl. 479, but the plaintiff was, in this case, nonsuited, because there was no evidence of any demand; *Lunt v. Adams*, 17 Maine, 230; *Veazie Bank v. Winn*, 40 id. 62; *Staples v. Franklin Bank*, 1 Met. 43.

(k) *Buller, J.*, *Leftley v. Mills*, 4 T. R. 170. In *Staples v. Franklin Bank*, 1 Met. 43, *Shaw, C. J.* said: "On the whole, we think the weight of authority is in favor of the conclusion to which we have come; and if it were a new question, it seems to follow, on legal principles, as a fair and legitimate conclusion from the established fact that the contract of the acceptor or maker is broken by a neglect or refusal to pay on demand, within reasonable time, on the last day of grace, that the holder may then have his remedy by action."

(l) *Turley, J.*, *Coleman v. Ewing*, 4 Humph. 241.

(m) Thus, in the following cases, it was held that the indorser was liable to a suit before the end of the third day. *Park v. Page*, at *Nisi Prius*, before *Parsons*, C. J., in 1808, cited in 1 Met. 48; *Shed v. Brett*, 1 Pick. 401. See *New England Bank v. Lewis*, 2 Pick. 125; *City Bank v. Cutter*, 3 id. 414, where a tender of the amount of the face of a note, by the indorser, on the day succeeding the third day, was held bad, because interest was not included. See *Boston Bank v. Hodges*, 9 id. 420, *Church v. Clark*, 21 id. 310; *Whitwell v. Brigham*, 19 id. 117; *Flint v. Rogers*,



has been urged against a suit against an indorser before the end of the third day, which does not apply where the maker is sued under similar circumstances, is, that in many cases the indorser could not get the notice in time to be of any service to him.<sup>(n)</sup> But the answer to this is, that the holder, by presenting at the proper time, and depositing the notice in the usual and proper conveyance, has done all that could be required of him in the way of exercise of due diligence; that the contrary rule would create great uncertainty, because the right of action would accrue at different times, according to the distance of the party sued, and the time must often be left to conjecture; and if a

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15 Maine, 67; *Dennie v. Walker*, 7 N. H. 199, by *Upham, J.*, who said: "It may now be considered as settled, that notice may be given, and suit brought against an indorser on the last day of grace, after protest has been made, the note being then considered dishonored." *Manchester Bank v. Fellows*, 8 Foster, 302. In *Crenshaw v. M'Kiernan*, Minor, 295, an averment of demand on the maker on the third day, and of a refusal at that time, was held, after verdict, to be a sufficient allegation that the maker had not paid before suit was brought. In *Bevan v. Eldridge*, 2 Miles, 353, it was held that an indorser was not liable till after the expiration of the third day. In this case, *Stroud, J.* said: "If, then, interest can be charged in advance to the end of the last day of grace, there can be no propriety in treating any party to a note as in default, in respect to payment, until that day has expired." In *Smith v. Bank of Washington*, 5 S. & R. 318, the demand was made May 13th, and suit brought May 16th. By the usual course of the mail, the notice could not have reached the defendant, an indorser, until the 19th. Held premature. *Gibson, C. J.* said: "But I think it clear that, whether notice be necessary *only* to enable the indorser to look to his concerns with the drawer, or whether it be to apprise him that he has encountered an immediate instead of a secondary liability, it is nevertheless a substantive part of the plaintiff's title to bring the action. This was expressly decided in *Rushton v. Aspinwall*, Doug. 679, on great consideration, and, as Lord *Mansfield* tells us, against the wishes of the court, by whom it was held, in a case exactly like the present, that the want of an allegation of notice of non-payment was fatal, even after verdict; and this on the ground that the title of the plaintiff was not merely set out defectively, but that he had set out *no* title. Now, as the plaintiff's title must be complete before suit is brought, it follows that the indorser must have notice before the impetration of the suit; or at least, that some fact be averred and proved that will excuse the giving of notice altogether. . . . From certain facts the law raises a conclusive presumption of actual notice, but it is not so absurd as to raise it from facts which negative all possibility that the presumption accords with the truth of the case. . . . The notice, being for the benefit of the indorser, cannot be dispensed with; and it would be extremely absurd to suppose that any benefit could flow from it before there was a possibility of its having been received." But in *King v. Holmes*, 11 Penn. State, 456, it was held that a notary might protest a note at any time after 3 P. M., and claim his fees. In *Castrique v. Bernabo*, 6 Q. B. 498, the plaintiff was nonsuited because the action was commenced at 5 P. M., and the notice could not, by the usual course of the mail, have reached the defendant before 4 or 5.

(n) See the remarks of *Gibson, C. J.*, cited *supra*, note *m*.

certain time is to be allowed to an indorser in which to receive notice, the same time should be given him to pay the demand in, because otherwise it would be saying that he was entitled to receive the notice for his benefit, and at the same time declaring that he should be precluded from taking any advantage from it. (o) But it must be observed that it has been held that the maker is only liable after a demand, when a demand is necessary, (p) which must be made at a reasonable time, (q) and an indorser after the same, and also after notice has been deposited where, according to the ordinary method of transportation, it will reach him in due time. (r) With regard to what hour shall

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(o) In *Shed v. Brett*, 1 Pick. 401, *Parker*, C. J. said: "The argument is, that notice of the non-payment is essential to the plaintiff's right of action; that it is necessary to aver it in the declaration as a fact existing; and that, as the case shows this could not be true, the plaintiff has failed in an essential point. But this argument proceeds upon the ground that there must be an actual reception of notice before the plaintiff can sue; and this is certainly fallacious. If the putting the letter into the post-office is notice in itself, which we have shown, then it was given before the commencement of the suit. And it would be mischievous to decide otherwise, for every plaintiff's right of action would commence at different times, according to the distance of the party sued; and the time of suing must be conjectured, as it cannot be known when the notice will be actually received. Besides, if the object of waiting be to give the party opportunity to take up the note, there must be a sort of double usance, for the holder must wait till his letter is received, and for a reasonable time afterwards for the party receiving it to come and pay the money. Who would take a bill or note remitted from New Orleans if this doctrine be correct? And if the parties liable be beyond the sea, such instruments would be mere waste paper. If the bill should not be accepted, or the indorsed note not paid, the unfortunate holder, with property belonging to the drawer or indorser before his eyes, must remain an idle spectator of the scramble of other creditors for it, or suffer it to be withdrawn by the debtor himself, without the power of arresting it. This cannot be sound doctrine; an averment of notice will be sufficiently proved by showing that the steps necessary to give the notice have been taken; if subsequently received, it will relate to the time when it was sent; if never received, the fact of having put it in the proper train is enough."

(p) *Greeley v. Thurston*, 4 Greenl. 479; *Veazie Bank v. Winn*, 40 Maine, 62. In *Pierce v. Cate*, 12 Cush. 190, *Shaw*, C. J. said: "The rule in regard to notes like the one in question is, that the note is payable at any time on actual demand, on the last day of grace; and if such actual presentment and demand is so made, and payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no presentment or demand is made by the holder upon the maker, the latter is not in default till the end of the business day." In *Butler v. Kimball*, 5 Met. 94, it was held that the action might be maintained when the writ is made after sunset, and delivered to the sheriff the next day, although there is no demand before the writ is made.

(q) See the cases cited *infra*, p. 414, note s.

(r) *Manchester Bank v. Fellows*, 8 Fost. 302. In *New England Bank v. Lewis*, Pick. 125, the action was brought before notice to the indorser, though it was received

be deemed reasonable, the same rule would apply here as in ordinary cases,(s) and the burden of proof is upon the holder to show a demand at a reasonable hour,(t) and, in the case of an indorser, after notice has been sent.(u) Whether the law is the

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by him on the same day, and had been put into the hands of the notary before the writ was given to the sheriff. Held, that the suit was prematurely brought. See *Stanton v. Blossom*, 14 Mass. 116.

(s) In *Lunt v. Adams*, 17 Maine, 230, the suit was brought after demand made at 8 A. M. Held premature. In *Park v. Page*, cited 1 Met. 48, and in *Staples v. Franklin Bank*, 1 Met. 43, the writs were served at 11 A. M., and it was held that the suits were properly brought. So in *McKenzie v. Durant*, 9 Rich. 61, where the writ was served at 4 P. M. *Shed v. Brett*, 1 Pick. 401, where the action was commenced in the evening. In *Whitwell v. Brigham*, 19 Pick. 117, an acceptor for the drawer's accommodation took up the bill on the second day, and commenced a suit against the drawer on the third. Held not premature. As to what is considered a reasonable hour of the day at which to make a demand, see *infra*, p. 417, note a, &c. It will be seen that, when a note is payable at a bank, a presentment there at any time within banking hours is to be considered reasonable. The same rule has been applied to the case under consideration, and it has been held, in the following cases, that the maker or indorser of a note payable at a bank was not liable till after the close of banking hours. *Boston Bank v. Hodges*, 9 Pick. 420, where the hours were from 9 to 2, and an action brought at 18 minutes past 9 was held premature. So *Church v. Clark*, 21 id. 310, where the writ was served at 1 minute past 12 A. M. The demand on the cashier at the bank, but after business hours, was held proper in *Flint v. Rogers*, 15 Maine, 67. In *Staples v. Franklin Bank*, 1 Met. 43, an action against a bank on its own post-note, it was contended that the bank was not liable till after the close of business hours, and that the same rules applied as in case of a note payable there; but *Shaw*, C. J. said: "It may be proper to make a remark on the point, that some of the cases in Massachusetts manifestly go upon the ground, that when a third person has accepted a bill or made a note payable at a bank, or when, from circumstances, it may be inferred that the parties intended that the note should be paid at a bank, the maker has the whole of the usual time of banking hours to pay it. This proceeds upon the ground that the parties have entered into an express or implied agreement that the note shall be so paid and treated. But when the bank itself has undertaken to pay a sum on any given day, they are bound, like any other promisor, to pay on demand on that day; and the only difference, in this respect, between a bank and an individual is this, that what would be reasonable time for a demand in case of individuals is fixed, in case of a bank, by their known usual hours of being open for business. This is the case in regard to common bank-notes, and it would be most pernicious, in regard to them, to establish a different rule, or raise a doubt respecting it. And a post-note, when by the lapse of time and the force of the contract it has become payable on demand, stands in this respect on the same footing with a bank-note, which is payable on demand in its terms."

(t) *Veazie Bank v. Winn*, 40 Maine, 62.

(u) *Manchester Bank v. Fellows*, 8 Foster, 302, where *Eastman*, J. said: "If the suit is commenced a day after the time that notice is given, or at any future time after notice, the proof is readily made; because, where the notice is proved, it shows for itself to have been before suit; but where, as in this case, the suit is instituted on the day of the notice, no such conclusion is apparent. The evidence does not show that

same with reference to notes on which no grace is allowed, does not seem to be settled.(v) We incline to hold, however, both on reason and on what seems to be the weight of authority, that a note without grace may be demanded within business hours of the day of maturity, and, if payment is refused, an action may be brought against the maker, or notice be given to an indorser, and an action brought against him, on the same day.(w) The question has never passed under adjudication in England, but in one of the early cases we find a difference of opinion on the subject between Lord Kenyon and Mr. Justice Buller.(x)

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the notice was given before the suit was commenced, and the court cannot presume it. And in all such cases the plaintiff must prove that the demand and notice were before the suits were brought, otherwise it does not appear that they have a cause of action. The plaintiffs in this case having produced no evidence showing that the notice was put into the post-office at Boston before the writ was served, it does not appear that a cause of action existed at the time of the commencement of the suit, and the action necessarily fails."

(v) In *Staples v. Franklin Bank*, 1 Met. 43, *Shaw*, C. J. said: "A different construction may perhaps apply when a note is payable without grace. As grace was originally matter of indulgence and courtesy, and not of contract, it perhaps may be contended that, although a debtor has the whole of the last day of the credit stipulated for by contract to make payment, yet a different rule may apply to grace, which is not part of the contract. So when the third day of grace falls on Sunday, as the right of one or the other of the parties must yield, it shall be that of the one who claims indulgence, and not of him who claims of right; whereas, if a bond were to be payable on Sunday, the debtor would have till the close of Monday to pay it. Some of the cases appear to turn on this distinction." In *Taylor v. Jacoby*, 2 Penn. State, 495, an action on a note where no grace was allowed, it was held that the note was not due, for the purpose of commencing suit or entering judgment, until after the termination of the day of payment. It has already been seen, that when a note without grace falls due on Sunday, it is not payable until the next secular day. *Supra*, p. 402.

(w) In *Staples v. Franklin Bank*, cited in the preceding note, the court appears to incline to the views expressed in the text.

(x) *Leftley v. Mills*, 4 T. R. 170. In *Colkett v. Freeman*, 2 T. R. 59, it was held that an express refusal in the morning to a holder to pay a bill constituted a complete act of bankruptcy, though several of the jury, which was a special one, said that by the practice of London merchants the payor has the whole day of maturity till five o'clock, P. M., within which to pay. In *Hume v. Peploe*, 8 East, 168, a plea of a tender of all the money due on a bill, after the day of payment, was held not to be a good plea in bar, because it did not show a performance of the contract. So *Poole v. Tumbridge*, 2 M. & W. 223, where Lord *Abinger* said: "I will not say that if this case arose, that the acceptor went on the day the bill became due to the house of the holder for the purpose of paying it, and could not find him, but on a subsequent day, when he found him, tendered him the money, I am not prepared to say that, in such case, the rules of law ought to be pressed so far as to render the party liable to an action the next day after the bill becomes due, and not to allow him to plead that tender, by which means the proceedings of a court of law are made nothing else but machinery to

A note may be negotiated on the second day of grace, and the holder will then be protected ; (y) but if negotiated on the third, there is a conflict of authority on the question whether the note

increase costs." In *Ex parte Moline*, 19 Ves. 216, 1 Rose, 303, it was held that a demand on the acceptor, at 11 A. M., and notice of non-payment to the drawer the same morning, warranted the proof of the debt against the drawer, who had become bankrupt. In *Staples v. Franklin Bank*, 1 Met. 43, *Shaw*, C. J. said: "In a late work, *Byles on Bills*, p. 131, it is stated that the acceptor of a bill, whether inland or foreign, or the maker of a note, should pay it on a demand made at any time within business hours on the day it falls due, and if it be not paid on such demand, the holder may instantly treat it as dishonored. But the acceptor has the whole of that day within which to make payment; and though he should in the course of that day refuse payment, which entitles the holder to give notice of dishonor, yet if he subsequently on the same day makes payment, the payment is good, and the notice of dishonor becomes of no avail. This writer cites *Hartley v. Case*, 1 Car. & P. 555, 676, 4 B. & C. 339. The point was made in that case, that notice could not be given on the day the note becomes due; but the case went off on another ground, and no opinion was given on this question. The passage cited appears contradictory to itself, inasmuch as it declares that the note is due and payable on demand on the last day of grace, and is dishonored if not then paid; and yet that the maker and acceptor have the whole day to pay it in. It would seem that there could be no dishonor, unless the maker had failed to comply with his contract; and if he has failed to comply with his contract, then, by a general rule of law, the holder has his remedy by action. . . . . It is probable, that, though the holder may have a strict right to proceed in all respects as upon a dishonored bill on the last day, after demand, refusal, and notice, yet it is so far the general practice to postpone notice and other proceedings till the day following, that it is regarded amongst merchants as a right. That it seems so to have been understood by men of business, appears by a remark of Mr. Justice *Buller*, in *Colkett v. Freeman*, 2 T. R. 59, 61; and also by an *obiter dictum* of *Bolland*, B., in *Webb v. Fairmaner*, 3 M. & W. 473, 474 (*supra*, p. 405, note f). But the case of negotiable bills and notes was not then under consideration. . . . . Possibly it may be considered that the holder has a right to treat the bill as dishonored, after demand and refusal, and even to commence an action, subject to be defeated and barred in case the maker should pay the amount due at any time on the last day of grace; though it is difficult to perceive how the holder can have a perfect right to treat the note as dishonored, by breach of the contract, and, at the same time, that the acceptor can have a perfect right, by payment of the bill, to perform his contract, and save himself from the consequences of such breach. In *Hartley v. Case*, 1 Car. & P. 556, *Abbott*, C. J., on a motion to show cause, says: 'I think notice of dishonor, given on the day on which the bill is payable, will be good or bad, as the acceptor may or may not afterwards pay the bill. If he does not afterwards pay it, the notice is good; and if he does, it of course comes to nothing.' This certainly implies that, after non-payment on demand, on any part of the last day, there is a breach of the contract of the maker, and no further demand is necessary to complete the holder's right against the maker, acceptor, and indorsers. But whether, after such breach, and before the close of the day, an action might be commenced against either, does not appear by this case, nor, as we believe, by any case decided in England" In *Chitty on Bills*, 274, 10th

(y) *Savings Bank v. Bates*, 8 Conn. 505.

is dishonored.(z) We should consider the correct rule to be, that where the note is payable generally, it is not dishonored until the close of the day, and when payable at a bank, not until the close of bank hours.

It is the usage of all our banks to consider notes and bills discounted by them, or left with them for collection, whether payable at the bank or generally, as dishonored at the close of business hours, which are then the bank hours, on the day of maturity. And the paper is then handed to a notary for demand and protest. And undoubtedly this usage would determine the rights and obligations of the parties in any case to which it applied.

The hours within which presentment for payment and for acceptance should be made are the same in both cases. In the case of paper not payable at a bank, demand may be made on the payor personally, or on his authorized agent, at any reasonable hour of the day, even so late as nine o'clock in the evening.(a)

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Lond. ed., the question is discussed, whether the acceptor has the whole day or not for payment. The author says that the holder may treat the bill as dishonored on the third day; and that this "appears now to be the established rule." In *Castrique v. Bernabo*, 6 Q. B. 498, which was an action against an indorser, it appeared that the notice was put into the mail the same day the action was commenced. It was held that the plaintiff was bound to show that, in the ordinary course of the mail, the letter would be delivered before the time of the commencement of the action.

(z) The note is held dishonored in *Pine v. Smith*, 11 Gray, and not dishonored in *Crosby v. Grant*, 36 N. H. 275. The two cases rest probably on the difference between the time when the right of action commences in the two States.

(a) In *Burbridge v. Manners*, 3 Camp. 193, a demand was made in the forenoon, and held good. Ex parte *Moline*, 19 Ves 216, a demand on an acceptor at 11 A. M., and notice sent immediately, were held to warrant a proof of the debt against the drawer, who had become bankrupt. Lord *Eldon* said: "I do not recollect any decision, that, if an acceptor declares at 11 o'clock in the morning that he will not pay, notice of that to the drawer is not good. If the law does not impose on the holder the duty of inquiring again before 5 o'clock, it would be extraordinary that this information to the drawer of an answer precluding any hope of obtaining anything by calling again should not have effect." In *Leftley v. Mills*, 4 T. R. 170, *Buller*, J. said: Bills of exchange "are payable at any time on the last day of grace, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour; but, on the other hand, to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences." So *Greeley v. Thurston*, 4 Greenl. 479. In *Dana v. Sawyer*, 22 Maine, 244, where the maker was called up from his bed a few minutes before midnight, the demand was held insufficient. *Shepley*, J. said: "Perhaps it might be proper to admit an exception in this and the like cases, if it should appear from the answer made to the demand that there was a waiver of any objection as to the time, or that



No fixed rule can be laid down beyond which a presentment will be unreasonable and insufficient to charge an indorser. In general, it should be made at such an hour that, having regard to the habits and usages of the community where the maker resides, he may reasonably be expected to be in a condition to attend to ordinary business. Various other circumstances are to be taken into consideration, such as the distance of the place of residence of the maker from the place where the note was dated, and where the holder at maturity was residing, and the season of the year when it fell due.(b) When a note or bill is payable at a bank, or at a banker's, it must be presented within business hours.(c) But if presented after that time, while any of the

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payment would not have been made upon a demand at a reasonable hour. But there is nothing in this agreed statement to show that payment might not have been refused because the demand was made at such an hour that the maker did not choose to be disturbed, or because he could not then have access to funds prepared and deposited elsewhere for safety." In *Farnsworth v. Allen*, 4 Gray, 453, a note dated at Boston, falling due in August, was presented at 9 P. M. to the maker at his residence, ten miles from Boston, after he and his family had retired. The maker refused to pay. Held sufficient. See *Lunt v. Adams*, 17 Maine, 230, *infra*, p. 420, note *f*; *Park v. Page*, *infra*, p. 420, note *e*.

(b) *Bigelow, J.*, *Farnsworth v. Allen*, 4 Gray, 453, *supra*, note *a*. There are various *dicta* to the effect that a presentment after "the hour of rest" would be unavailing. Thus, in *Barclay v. Bailey*, 2 Camp. 527, Lord *Ellenborough* said: "If the presentment had been during the hours of rest, it would have been altogether unavailing." So *Best, C. J.*, *Triggs v. Newnham*, 10 J. B. Moore, 249. In *Wilkins v. Jadis*, 2 B. & Ad. 188, Lord *Tenterden, C. J.* said: "A presentment at 12 o'clock at night, when a person has retired to rest, would be unreasonable." So *Shepley, J.*, *Dana v. Sawyer*, 22 Maine, 244. In *Cayuga Co. Bank v. Hunt*, 2 Hill, 635, *Cowen, J.* said, that business hours "generally range through the whole day down to bedtime in the evening." But this cannot mean, that the mere fact that the maker had retired to bed in the evening before the demand would make it unreasonable. Thus, in *Farnsworth v. Allen*, 4 Gray, 453, *supra*, note *a*, *Bigelow, J.* said: "It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of the note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it seasonable or otherwise."

(c) *Parker v. Gordon*, 7 East, 385, where a demand at 6 P. M. was held insufficient, the banker's hours ending at 5. Lord *Ellenborough, C. J.*: "If a party choose to take an acceptance, payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly; and if by going there out of due time the bill be not paid, it is his own fault, and he cannot proceed as upon a dishonor of it; at least not without going a step further, and presenting it for payment to the party himself; otherwise it is fishing for the dishonor of a bill made payable at a banker's, to present it there for payment at a time when it is known in the usual course of business that it cannot be paid." So in



officers are present to give an answer at the time of the demand, it will be sufficient. (d) There is this difference, also, between a demand on the payor at his residence, and one at his place of business; in the former case it may be made at any hour of the day or evening when he may reasonably be expected to be able to attend to business; (e) but if

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*Elford v. Teed*, 1 Maule & S. 28, a presentment by a notary's clerk, between 6 and 7 P. M., was held insufficient, and that no presumption of a prior presentment within banking hours could be made from the fact that demand was made by the clerk. See *Boston Bank v. Hodges*, 9 Pick. 420; *Church v. Clark*, 21 id. 310; cited *supra*, p. 414, note s. Where, by the usage of a bank at which a note is made payable, the payor is allowed until the expiration of banking hours for payment, a demand before that time is insufficient, unless the note is permitted to remain in the bank till the close of business hours. *Planters' Bank v. Markham*, 5 How. Miss. 397; *Harrison v. Crowder*, 6 Smedes & M. 464. In *Whitaker v. Bank of England*, 6 Car. & P. 700, 1 Cronp. M. & R. 744, an action against the bank, by a customer who had accepted a bill payable there, for not honoring the acceptance, it was proved that the bill was presented at 9 A. M., and left till 11 A. M., when payment was demanded. A demand was again made by the notary at 6 P. M., after banking hours. The court held that the note must be considered as continuing in a course of presentment from 9 to 11; that if the bank had funds at a reasonable time before 11, they were liable; but that they were not liable to pay after banking hours, even though they had funds, and had a person stationed there who answered, "Not sufficient effects." A demand on a bank of a note in which the bank itself is the maker, made before 11 A. M., was held good. *Staples v. Franklin Bank*, 1 Met. 43, *supra*, p. 414, note s.

(d) *Garnett v. Woodcock*, 1 Stark. 475, 6 Maule & S. 44, where the bill was presented between 7 and 8 P. M., and a boy returned the answer, "No orders." Lord *Ellenborough* said: "Bankers do not usually pay at so late an hour; but if a person be left there who gives a negative answer, there is no difference between the case and that of a presentment at a merchant's. I think it is perfectly clear, that if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient if it were made before 12 at night. In general there are two presentments, one in the morning, and the other in the evening; but if there be a presentment in the evening, and the party is ready to give an answer, he does all that is necessary. The bank returned an answer by the mouth of its servant, and *non constat* but that he was stationed there for the express purpose." *Henry v. Lee*, 2 Chitty, 124; *Shepherd v. Chamberlain*, 8 Gray, 225; *Flint v. Rogers*, 15 Maine, 67; *Commercial Bank v. Hamer*, 7 How. Miss. 448, where the notary, finding the front door shut, entered by the back door and demanded payment of the teller, who said that there were no funds; *Cohea v. Hunt*, 2 Smedes & M. 227; *Goodloe v. Godley*, 13 id. 233; *Bank of Syracuse v. Hollister*, 17 N. Y. 48, where the paying teller, being a notary, presented the note to himself outside the bank doors, which were shut; *Bank of Utica v. Smith*, 18 Johns. 230.

(e) In *Barclay v. Bailey*, 2 Camp. 527, presentment was made at the place designated as the acceptor's residence, at 8 o'clock, P. M. An answer was given, that the acceptor had become bankrupt, and had removed. The defendant, the drawer, proved that he had stationed a person at the house, to take up the bill, from 9 A. M. to 4 P. M. Held, that the demand was sufficient. Lord *Ellenborough* said: "I think this present-

demand be made at the place of business, it must be made within the usual and ordinary business hours.(f) But no objection can be made to the demand at either place at any hour, if the payor had his agent there at that hour to make answer to the demand.(g)

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ment sufficient. A common trader is different from a banker, and has not any peculiar hours for paying or receiving money. If the demand had been made during the hours of rest, it would have been altogether unavailing, but eight in the evening cannot be considered an unreasonable hour for demanding payment at the house of a private individual who has accepted a bill." So *Wilkins v. Jadis*, 2 B. & Ad 188. In *Park v. Page*, at *Nisi Prius*, before *Parsons*, C. J., in 1808, cited 1 Met. 48, a demand before 11 A. M. was held good. See the cases cited *supra*, p. 418, note c.

(f) *Shed v. Brett*, 1 Pick. 401. This would only apply where there are regularly established business hours. See *Dana v. Sawyer*, 22 Maine, 244. In England it would seem that the hours within which demand may be made at any other place than the bank or a banker's may extend so late as 7 or 8 P. M. Thus, in *Morgan v. Davison*, 1 Stark. 114, Lord *Ellenborough* held that a demand at a counting-room between 6 and 7 P. M., when no one was present but a girl to take care of it, was sufficient; as "the hour was not an improper one, and the holder might reasonably expect to find the party in his counting-house at that hour. In *Triggs v. Newnham*, 1 Car. & P. 631, 10 J. B. Moore, 249, a presentment of a bill payable at an attorney's office at 8 P. M. was held sufficient. In *Lunt v. Adams*, 17 Maine, 230, demand was made on the maker at his store at 8 A. M. Held insufficient. *Shepley*, J. said: "There may be little difficulty in towns and cities, where there are business on banking hours, in deciding that a demand should be made during those hours. But in places where no particular hours are known for making and receiving payments there is more difficulty in determining what would be a reasonable hour for this purpose. It may often happen that the party having a payment to make would appropriate the earlier part of the day to obtain the means, either by collecting or by procuring a loan from a bank or from some person in a neighboring town. To establish a rule that would deprive him of that opportunity, and subject him to a suit, and that would render him liable to have his business broken up while thus employed, might justly be regarded as unreasonable. The general rule being that the party has all the day to make his payment, that in relation to bills and notes should not be so varied as to prevent his having a fair opportunity to make arrangements and provide the means of payment before he is subjected to a suit. In this case the demand was made at an hour so early as to deprive him of that opportunity, and it was not, therefore, made at a reasonable hour." In *Cayuga Co. Bank v. Hunt*, 2 Hill, 635, *Cowen*, J. said, that business hours, "except where the paper is due from the bank, generally range through the whole day down to bedtime in the evening." But this, it is conceived, would vary according to the custom of each place.

(g) See the cases cited *supra*, note d. Where the payor and payee are willing, the one to make and the other to receive payment at any hour, and the payor is to acquire some right as against a third party on paying, such third party cannot object to the demand because it was made at an unreasonable hour. Thus, in *Whitwell v. Brigham*, 19 Pick. 117, the acceptor of a bill for the accommodation of the drawer, having paid the bill on the second day of grace, commenced a suit against the drawer at 6 o'clock, A. M.; and the suit was held not to be premature, on the ground that the payment might as well have been made at any previous hour of the third day.

It may here be remarked, that a notary's certificate of presentment, which does not state the time of day, carries with it the presumption that the demand was made at a proper hour, when nothing appears to the contrary. (*h*)

## SECTION VI.

### AT WHAT PLACE DEMAND SHOULD BE MADE.

THE principles of law applicable to the question, where the demand should be made, are very different in case of a note or bill payable generally and one in which a place of payment is specified. We will first consider the rule with reference to notes in which no place is mentioned for payment.

We should say that, in general, a personal demand would be sufficient, if made on the maker or acceptor at any place where he may reasonably be expected to be in a condition to pay; and if made in any other place, — such, for instance, as the street, — it would usually be good, unless objection were made to payment because the place was an improper one, or some similar reason were given for the refusal. (*i*)

But a personal presentment is not necessary; (*j*) and in case such a one is not made, in the absence of circumstances which amount to an excuse for demand, *that* demand must be made where the maker resides, or at his usual and ordinary place of business. (*k*)

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(*h*) *Cayuga Co. Bank v. Hunt*, 2 Hill, 635; *De Wolf v. Murray*, 2 Sandf. 166.

(*i*) *Supra*, p. 372, note *z*. In *Baldwin v. Farnsworth*, 1 Fairf. 414, presentment was made to both promisors of a joint and several note, made payable at their dwelling-houses, at the barn-yard of one of the makers. Held sufficient, as they "made no objection, and intimated no readiness to pay in the house."

(*j*) The contrary is stated in *Duke of Norfolk v. Howard*, 2 Show. 235, *supra*, p. 371, note *y*, but does not seem to have been followed. In *Saunderson v. Judge*, 2 H. Bl. 509, it is said that "it is not necessary that a demand should be personal, and it is sufficient if it be made at the house of the maker of the note." So in *M'Gruder v. Bank of Washington*, 9 Wheat. 198, *Johnson, J.* said: "A demand on the maker is, in general, indispensable, and that demand must be made at his place of abode or place of business. That it should be strictly personal is not required. It is enough if it is at his place of abode, or generally at the place where he ought to be found."

(*k*) In *Sussex Bank v. Baldwin*, 2 Harrison, 487, it was contended that the demand ought to have been at the maker's house; but *Dayton, J.* said: "It appears

It is clear that a demand at the place of business, without any at the place of abode, is sufficient,<sup>(l)</sup> and this ordinarily would be the safest and most proper place to present the note. It is said that a demand at the maker's house would be equally good,<sup>(m)</sup> but it may be doubted whether this is not subject to some qualification.

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by the evidence that the office in question was the regular place of business of the maker; and I have no doubt where a person has an office, or known and settled place of business for the transaction of his monied concerns, whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place, as well as a presentment and demand at his residence, is good in law. It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his monied concerns. The counting-room of a banker or merchant may be a proper place for a demand, though the manufactory or workshop would not. Yet if the manufacturer or mechanic have an office or known place of business for the purpose aforesaid, a good demand may be made there." In *West v. Brown*, 6 Ohio State, 542, *Bowen, J.* remarked: "It is said that the demand ought to have been made at the maker's family residence, and could not be made elsewhere, as he had no well-established business office. It seems that he occupied a room at Harding's, where he directed calls to be made, and where he received them. By his own acts and declarations he authorized the place to be known as his office for transacting business. He apprised the public that he could be found there, that 'word left there would find him.' He claimed no other business location. He gave no directions or authority for calling on him for business purposes at his residence. His desire was to have an office for doing business, where he might conveniently and with certainty be found, and a selection of such place he accordingly made at Mr. Harding's, where he was sought by the notary public, but when applied for happened to be out. The object of the visit, however, was fully explained to those who were found in the office. We are satisfied that reasonable diligence in this case was used by the holder of the note to obtain payment from the maker, and that the claim that no demand of payment was made of him is not well founded."

(l) See the cases cited *supra*, note *k*; also *Nott v. Beard*, 16 La. 308.

(m) In *Shamburgh v. Commagere*, 10 Mart. La. 18, *Porter, J.* said: "A man's residence is the place where it is presumed he is to be found. and has funds to meet the demand, and there is no obligation on the holder to seek for him elsewhere." In *Oakey v. Beauvais*, 11 La. 487, *Carleton, J.* said, that demand must be made personally, or at the domicile of the maker, to bind an indorser. By "domicil," it is presumed "place of residence" at the time of maturity was intended. In *Deyraud v. Banks*, 16 La. 461, the protest stated that the notary demanded payment at the domicile of the maker, and was answered that there were no funds there to pay it. Held sufficient evidence of a demand to charge the maker and indorser. So in *Stivers v. Prentice*, 3 B. Mon 461, it was held that a "presentment of a bill at the dwelling-house of the acceptor, in the absence of any proof of a special usage to the contrary, and he not being a banker, was sufficient; and especially as there was one there who answered for him, that no provision had been made for payment." In *Story on Bills*, §§ 236, 351, *Prom. Notes*, § 235, it is said, where the maker or acceptor lives in one town and does business in another, or where he resides in one part of a town and his place of business is another part, that the holder has his option at which to present, and that a demand at

Thus, where the maker has a well-known and long-established place of business, where he is in the habit of transacting his financial concerns, and where a demand might be made, presentment of a note, if of any considerable amount, should, it is believed, be made here rather than at his residence; and in the absence of other circumstances, it could hardly be deemed using due diligence to demand the note at the latter place. But we know of no authority for this.(n)

If the maker has a place of residence, but none for the transaction of business, demand should be made at the former. Thus where, at the time a partnership note fell due, the firm had been dissolved, a presentment at their former place of business was held insufficient; it appearing that one of the partners was, at the time of the maturity of the note, residing in the same town, and that his house might have been found by the holder without much difficulty.(o)

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either would be sufficient. But in a note the learned author remarks that he has found no case in point, but cites Chitty on Bills. In the latter work, p. 250, 10th Lond. ed., it is stated that "presentment should be to the drawee of the bill or the maker of the note at his residence."

(n) This refers to a presentment which is not personal. In *West v. Brown*, 6 Ohio State, 542, *supra*, note k, the maker had a well-known place of residence, and a desk-room, in an office in company with others, where he transacted business. A demand at the latter place while the maker was out was held sufficient. In *Lanusse v. Massicot*, 3 Mart. La. 261, the maker, four months before the maturity of the note, was turned out of his domicil. which was sold on execution. He went with his family to his father-in-law's, but he spent two months at his brother-in-law's to attend to his business. A demand at the latter place was held sufficient to charge an indorser. "This demand must either be made of the maker of the note personally, or at the place of his residence. But in this particular instance it appears to the court that the maker had no fixed place of residence anywhere when the notes became due, and that the house in which he spent the half of his time to attend to his business in the city was more to be considered as the place of his residence, for such purposes, than the plantation of his father-in-law where his family had a temporary asylum."

(o) *Granite Bank v. Ayers*, 16 Pick. 392, *Shaw*, C. J. said: "The firm of Poor & Co. consisted of Poor and Breeden. They had failed and given up their place of business, and the same place had been let to strangers, between whom and Poor & Co. there was no privity, and no inquiry was made except at that place, and there the notary was informed that Poor & Co. had failed and gone out of town. But the information was not correct. By referring to the name of Samuel Poor & Co in the directory, it would have been found that Breeden was the partner indicated by the word Co., and by reference to the name of Breeden it would have been found that he had a domicil in town; and it is now found that he was, in fact, residing in town. It is no excuse for want of such presentment and demand that the promisors had failed, as the plaintiffs cannot recover without proof of demand and notice, or some fact which will excuse

With regard to the conduct necessary to be pursued by the holder where the maker's house or place of business is closed, or where he has removed, absconded, or has died, or has no place of business or residence, reference may be had to a subsequent section on excuses for non-demand, where this subject is treated. (*p*) And it will be sufficient here to remark, that in such cases, where any demand at all is necessary, the maker's last usual place of abode or business is the place at which presentment is to be made.

Where a note is payable generally, the parties may agree upon the place where it shall be presented, and parol evidence is admissible to prove such agreement: (*q*) and where a maker by his

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the want of a demand; and as the proof fails of showing any demand, or any legal excuse for the want of it, the plaintiffs are not entitled to recover." In *Packard v. Lyon*, 5 Duer, 82, a note had been deposited in a bank for collection; demand was made there, with inquiry as to the residence of the maker. She was a married woman. Her name was not to be found in the directory. It appeared that she was, at the time, keeping a boarding-house in the city. Held insufficient, and the indorser was discharged.

(*p*) *Infra*, chapter on Excuses.

(*q*) *Pearson v. Bank of the Metropolis*, 1 Pet. 89. *Marshall, C. J.* said: "But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply. . . . The indorser undertakes conditionally to pay if the maker does not, and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent." See *Thompson v. Ketcham*, 4 Johns. 285. But *Thompson, C. J.*, in *Anderson v. Drake*, 14 id. 114, referring to *Thompson v. Ketcham*, said: "The note was dated at Montego Bay, yet it was not deemed payable there; otherwise, parol evidence would have been inadmissible to prove it was payable at New York. Such evidence would have been repugnant to the written note, if the inference of law was that it was payable at Montego Bay." So in *Pierce v. Whitney*, 29 Maine, 188, *Shepley, J.* said: "The first cause of complaint presented by the bill of exceptions is, that the counsel for the plaintiff was not permitted to make an argument to the jury to show that the note, by the understanding and agreement of the parties, or at least on the part of the maker, was to be paid in Boston. In doing so the presiding judge acted correctly. It had already been decided that the note was not made payable in the city of Boston, because it appeared to have been made and dated there. Parol evidence cannot be received, or have the effect to show, that a note not made payable at any particular place was, in fact, agreed to be payable at a particular place."



directions or acts has induced the holder to make the presentment at any place in good faith, he would be estopped from objecting to the demand on the ground that the place was an improper one.(*r*) A presentment at the place thus appointed is also sufficient to charge an indorser.(*s*) The law with reference to altering a note or bill by the addition of a place of payment, either in the body or by way of memorandum, will be considered hereafter.

We have already seen the conflict which has existed in the English cases with reference to acceptance and notes payable at a specified place, and that the statute 1 & 2 Geo. IV. c. 78, was passed to obviate the difficulty.(*t*) We will now consider the law of that country with reference to the liability of the acceptor.

By the terms of the statute, an averment and proof of demand is necessary when the bill is accepted payable at a particular place "only, and not otherwise or elsewhere." It is not necessary, however, to use all these words, "and not elsewhere" having been held to make an acceptance special and conditional ;(*u*) that is, to require demand at that place. The same rules would doubtless apply where the bill was drawn payable at a specified place only, and not elsewhere, and accepted generally.(*v*)

An averment and proof of demand at the place is not necessary where a bill is accepted payable at a particular place without the exclusive words,(*w*) nor where a bill is drawn payable under like conditions, and accepted generally.(*x*) The acceptor of a bill, accepted payable at a specified place, as, for instance, at a banker's, without the words "only, and not elsewhere," will

(*r*) *Sussex Bank v. Baldwin*, 2 Harrison, 487, by *Dayton, J.*

(*s*) *Sussex Bank v. Baldwin*, 2 Harrison, 487 ; *State Bank v. Hurd*, 12 Mass. 172.

(*t*) *Supra*, p. 308, notes.

(*u*) *Higgins v. Nichols*, 7 Dowl. 551.

(*v*) *Infra*, note *w*.

(*w*) In *Halstead v. Skelton*, 5 Q. B. 86, 2 Dowl. n. s. 69, the declaration stated that the defendant accepted the bill "payable at A. & Co.'s," and that he promised to pay it "according to the tenor and effect thereof." A demurrer, that the bill was not alleged to have been presented at A. & Co.'s for payment, was overruled as frivolous. It will not be a variance to declare upon such a bill as payable at the place mentioned. *Blake v. Beaumont*, 4 Man. & G. 7, 4 Scott, N. R. 617, 1 Dowl. n. s. 697.

(*x*) *Selby v. Eden*, 3 Bing. 611, 11 J. B. Moore, 511 ; *Fayle v. Bird*, 6 B. & C. 531, 2 Car. & P. 303, 9 Dow. & R. 639.



still remain liable without any presentment at the place, though he had funds with the banker sufficient to meet the acceptance, and by the failure of the latter had lost the money. (y)

The liability of the drawer and indorser of a bill has not been altered by the statute. (z) Therefore, if the bill is drawn payable at a specified place, and accepted so payable, it is necessary both to aver and prove a presentment there, to charge them. (a) But inasmuch as, in an action against them, if the bill has been accepted payable at a certain place, without being drawn in that manner, no acceptance at all need be stated, (b) a presentment at the place need not be averred, (c) but it should be proved. (d)

(y) *Turner v. Hayden*, 4 B. & C. 1, 6 Dow. & R. 5, Ryan & M. 215; *Sebag v. Abitbol*, 4 Maule & S. 462.

(z) The statute "is confined in its operation to the case of acceptors alone." *Tindal*, C. J., *Gibb v. Mather*, 8 Bing. 214, 221.

(a) *Chitty on Bills*, 10th Lond. ed., 375. In *Boydell v. Harkness*, 3 C. B. 168, where the bill was drawn payable in London, *Maule*, J., interrupting counsel, said: "The necessity of a distinct allegation of presentment in London, if any exists, arises here from the fact of there being a direction in the bill, on the part of the drawer, to pay the bill there. If the drawer directs the drawee to pay the bill at a particular place, the liability of the drawer and indorsers arises only on the drawee's failure to pay upon the bill being presented to him at the place indicated." The case itself decides that, since the venue was laid in London, a general allegation of presentment was sufficient, under the rule of *Hilary T. 4 Wm. IV. r. 8*. In *Lyon v. Holt*, 5 M. & W. 250, the head note reads: "Where a bill is drawn payable to the order of the drawer at a particular place, it seems that a declaration against the drawer or indorser, alleging a presentment generally, is sufficient after verdict." In *Byles on Bills*, 168, note x, this is doubted, and *dicta* in *Boydell v. Harkness*, 3 C. B. 168, would also seem somewhat inconsistent with it.

(b) *Jones v. Morgan*, 2 Camp. 474; *Tanner v. Bean*, 4 B. & C. 312; *Bayley*, B. *Parks v. Edge*, 1 Crompt. & M. 429. And if alleged, need not be proved. *Tanner v. Bean*, 4 B. & C. 312; *contra*, *Jones v. Morgan*, 2 Camp. 474.

(c) *Parks v. Edge*, 1 Crompt. & M. 429, 3 Tyrw. 364, an action against an indorser. The bill was accepted payable at a certain place. *Harris v. Packer*, 3 Tyrw. 370, note, *infra*, note d.

(d) *Gibb v. Mather*, 8 Bing. 214, 1 Moore & S. 387, 2 Crompt. & J. 254. In an action by an indorser against the drawer of a bill, accepted payable at a banker's, the declaration did not state any acceptance, but only a presentment to the acceptor, and his refusal to pay. The proof was presentment to the clerk of the banker at the clearing-house. Held, that the presentment was sufficiently proved. *Harris v. Packer*, 3 Tyrw. 370, note. A presentment of a bill accepted payable at a banker's to his clerk at the clearing-house is sufficient. *Reynolds v. Chettle*, 2 Camp. 596. An averment that a bill accepted payable at a banker's was, when due, presented to the banker's for payment according to the tenor thereof, and that the banker, an acceptor, refused payment, shall be supported after judgment on a sham plea. *Huffam v. Ellis*, 3 Taunt. 415. So in an action against an indorser of a bill, an averment of presentment to the banker and acceptor according to the tenor of the bill was held sufficient upon special demurrer, assigning for

The liability of the maker and indorser of a note is also unchanged by the statute.<sup>(e)</sup> The rule on this point is, that where the place is mentioned in the body of the note, presentment must both be averred and proved.<sup>(f)</sup> But if the place is stated in a

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cause that no presentment at the house was averred. *Bush v. Kinnear*, 6 Maule & S. 210. Where a bill is drawn, payable to the order of the drawer at a particular place, it seems that a declaration against the drawer or indorser, alleging a presentment, generally is sufficient after verdict. *Lyon v. Holt*, 5 M. & W. 250. An allegation of presentment to the acceptor is proved by evidence of presentment at the place specified. *Hardy v. Woodroffe*, 2 Stark. 319; *Giles v. Bourne*, 6 Maule & S. 73, 2 Chitt. 300; *Wilmot v. Williams*, 8 Scott, N. R. 713. These were actions against the drawers of bills accepted payable at a banker's. The same has been held where the bill was directed to the drawee at a certain place, and accepted by him generally. *Hine v. Allely*, 4 B. & Ad. 624. But in such case no allegation of presentment to the acceptor is necessary. It is sufficient if there is an averment of due presentment at the place. *De Bengareche v. Pillin*, 3 Bing. 476, 11 J. B. Moore, 350; *Hawkey v. Borwick*, 4 Bing. 135, 12 J. B. Moore, 478, 1 Younge & J. 376, an action against an indorser, where it was also held that a presentment to the banker was not necessary. So *Philpott v. Bryant*, 3 Car. & P. 244, 4 Bing. 717, 1 Moore & P. 754, where the acceptor had died before the maturity of the bill. In *Benson v. White*, 4 Dow, 334, a declaration against the acceptor stated that payment was demanded at the place where the bill was made payable, without averring a refusal, but in conclusion stated that the acceptor had not paid any of the sums mentioned. Judgment was entered for the plaintiff, and on a writ of error, brought for want of an averment of a refusal, the judgment was affirmed in the House of Lords. See to the same point *Butterworth v. Despencer*, 3 Maule & S. 150, *infra*, note *f*.

<sup>(e)</sup> *Supra*, note *z*, *Parke, B.*, *Emblin v. Dartnell*, 12 M. & W. 830; *Pollock, C. B.*, *Spindler v. Grellett*, 1 Exch. 384.

<sup>(f)</sup> *Sanderson v. Bowes*, 14 East, 500; *Dickinson v. Bowes*, 16 id. 110; *Howe v. Bowes*, id. 112, 5 Taunt. 30; *Emblin v. Dartnell*, 12 M. & W. 830, where a count in a declaration was held bad after verdict, for omitting to allege a presentment at the place; *Sands v. Clarke*, 8 C. B. 751; *Vander Donckt v. Thellusson*, id. 812, where the note was made in Belgium, in the following form: "À trois mois de date je payerai à l'ordre de Mons. F. Vander Donckt la somme de cinq cent francs, valeur reçue comptant. Accepté, bon pour cinq cent francs, payable à la fin d'Octobre, 1843. Chez M. Legrelle. C. Thellusson." Held, that this was to be considered as a note payable at a specified place; that the words "Chez M. Legrelle" could not be treated as a mere memorandum, because they were separated from the preceding ones by a full period; and that, by the law of *England*, there must be a presentment at the place named. The defendant objected that there was a variance, because the declaration described the note generally, and that there was no averment of presentment at the place. The plaintiff introduced evidence to show that, by the law of Belgium, a presentment at the place was not necessary. The judge directed the jury to find for the plaintiff, if they believed the law of Belgium to be as stated, and they found a verdict in accordance with it. New trial denied. *Spindler v. Grellett*, 1 Exch. 384. In this case the declaration stated that the defendant made his promissory note, and thereby promised to pay to the plaintiff "by the name and addition of Miss Jessie Hope, at 10 Duncan Street, Edinburgh," the sum of £ 200. Averment, that the plaintiff was always ready and willing to receive the said sum, according to the tenor and effect of the note, of which the defendant had notice. Breach, non-payment. Held, on general demurrer,

memorandum at the foot of the note, beneath the maker's signature, this is treated as only directory, and not a substantive part of the contract, and presentment at that place is not essential.(g)

The law with reference to altering a note or bill by the addition of a place of payment, either in the body of the instrument or by way of memorandum, will be found on a subsequent page.(h)

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that this was a note payable at a specified place, and that the declaration was bad for not averring a presentment at that place. *Rolfe, B.* : "The ground of demurrer is, that the note appears, by the declaration, to have been made payable at a particular place, and there is no averment of presentment at that place. First, it is said that such is not the true construction of the note, and that the words 'at 10 Duncan Street' are merely descriptive of the person of the payee. But it is impossible to torture the words to any such meaning, without endeavoring to make obscure that which is perfectly plain. Secondly, it is said that it is not necessary to aver a presentment, because the note is not negotiable; and *Wain v. Bailey*, 10 A. & E. 616, is relied on (which decided that, where the instrument is not negotiable, the maker is bound to pay it without its production, and therefore it is no answer to say that he was always ready and willing to pay on the note being delivered up). But in that case the party could not be damnified by the non-delivery of the note; for the instrument not being negotiable, the payee alone could sue upon it. No such distinction exists as to the necessity for presentment, which must be averred, whether the note be negotiable or not. The third point is, that, assuming this to be a note payable at a particular place, the declaration alleges that which amounts to an averment of presentment, namely, that the party was always ready and willing to receive the money according to the tenor and effect of the note. It seems strange to endeavor to construe words which have one meaning so as to give them another and different meaning. Those words cannot apply to a presentment, and never were intended to mean it." In *Butterworth v. Despencer*, 3 Maule & S. 150, the declaration averred a presentment at the place specified, and that the defendant, though often requested, refused to pay. A demurrer, on the ground that there was no averment of a refusal at the place, was overruled. See *Benson v. White*, 4 Dow, 334, *supra*, note d. The contrary doctrine was held in the earlier cases. *Wild v. Rennards*, 1 Camp. 425, note; *Nicholls v. Bowes*, 2 id. 498.

(g) *Saunderson v. Judge*, 2 H. Bl. 509; *Richards v. Milsington*, Holt, N. P. 364, note; *Price v. Mitchell*, 4 Camp. 200; *Exon v. Russell*, 4 Maule & S. 505; *Williams v. Waring*, 10 B. & C. 2, 5 Man. & R. 9; *Masters v. Baretto*, 8 C. B. 433. In this case the maker had indorsed the note, and it was contended that, by the indorsement, he had incorporated the memorandum into the body of the note; but this was overruled. Another distinction attempted to be taken between the cases cited *supra*, note f, and the present was, that in the former the memorandum began with the word "at," while in the latter it began with "payable at"; but this was likewise overruled. In *Exon v. Russell*, 4 Maule & S. 505, a description of a note with such a memorandum at the foot, as payable at a specified place, was held to be a variance. *Contra*, *Sproule v. Legg*, 3 Stark. 156, 2 Dow. & R. 15, 1 B. & C. 16. But if the declaration merely states that the note was made payable at the place, without saying that it was so payable according to the tenor of the note, this does not amount to a misdescription, and may be rejected as surplusage. *Hardy v. Woodroffe*, 2 Stark. 319. In *Trecothick v. Edwin*, 1 id. 468, Lord *Ellenborough* held, that if the memorandum was printed, it must be considered as a part of the note, having been made at the same time. *Sed quære*.

(h) *Infra*, Vol. II. pp. 546, 547.

The law on this subject in this country is, as has already been remarked, different from that of England. In all the States, with the exception of Louisiana and Indiana, it is now held that both maker and acceptor are liable, without a presentment at the place designated; (i) but the fact that either of them had funds there ready to be paid over on presentment of the note or bill might be pleaded in reduction of damages or mitigation of costs; (j) but not in bar of the action. (k) But it has been held that the declaration should state the place at which the note is payable, and that a count, which described the note as payable generally, was fatally defective; in other words, that this constituted a variance. (l)

An opinion has been entertained by some courts that an averment and proof of demand are necessary in case of a note payable on demand, or without any time being specified; the reason being, that where the time is fixed, the defendant may easily aver a readiness and ability to pay at the place on presentment; but where the time depends entirely on the pleasure of the holder, it would be impossible in many cases to set up this defence. (m)

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(i) *Supra*, p. 309, note a.

(j) *Supra*, p. 309, note a.

(k) *Supra*, p. 309, note a.

(l) *Covington v. Comstock*, 14 Pet. 43; *Sumner v. Ford*, 3 Pike, 389.

(m) In *Wallace v. M'Connell*, 13 Pet. 136, 146, *Thompson, J.* attempted to reconcile the cases of *Wild v. Rennards*, 1 Camp. 425, note, *Nicholls v. Bowes*, 2 id. 498, and *Sanderson v. Bowes*, 14 East, 500, on the ground that the former cases were actions on notes payable at a time fixed, and the latter was on a note on demand. He said: "Lord Ellenborough, in the course of the argument in *Saunderson v. Bowes*, in answer to some cases referred to by counsel, observed: 'Those are cases where money is to be paid, or something to be done at a particular time as well as place; therefore the party defendant may readily make an averment that he was ready at the time and place to pay, and that the other party was not ready to receive it; but here the time of payment depends entirely on the pleasure of the holder of the note.' It is true Lord Ellenborough did not seem to place his opinion, on the ultimate decision of the cause, upon this ground; . . . and there is certainly a manifest distinction between a promise to pay on demand at a given place and a promise to pay at a fixed time at such place. . . . Where the promise is to pay on demand at a particular place, there is no cause of action until the demand is made, and the maker of the note cannot discharge himself by an offer of payment, the note not being due until demanded." A decision to the like effect was made in *Bank of North Carolina v. Bank of Cape Fear*, 13 Ired. 75, where *Ruffin, C. J.* said, that there was no doubt that the law was as held in that case, and that the cases in America clearly admit the distinction. A similar opinion was expressed by *Stanard, J.*, in *Armistead v. Armisteads*, 10 Leigh, 512, who said that "it would probably be held that there is no default of the maker or acceptor until such demand be

The contrary doctrine, however, has been held by several courts,<sup>(n)</sup> and the ground on which their decisions are based is this: No such presentment is necessary where the time is fixed, and a presentment prior to the suit is not essential, in the case of notes on demand without any place being designated; therefore a presentment at the place cannot be necessary where both these circumstances concur in the same note; and the fact that

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made, and consequently that no action would accrue to the payee until such demand should be made." In *Caldwell v. Cassidy*, 8 Cowen, 271, *Savage*, C. J. said: "In the case of a note payable on demand at a certain place, — a bank-note, for instance, — I apprehend a demand would be necessary, and must be averred." But the same judge held the contrary in *Haxtun v. Bishop*, 3 Wend. 1, *infra*, note *n*. In Maine, R. S. 1857, p. 273, it is enacted that, "in an action on a promissory note payable at a place certain, either on demand or on demand at or after a time specified therein, the plaintiff shall not recover, unless he proves a demand made at the place of payment prior to the commencement of the suit." A note payable at a time and place certain is not within the statute. *Stowe v. Colburn*, 30 Maine, 32.

(*n*) *Haxtun v. Bishop*, 3 Wend. 13; *New Hope D. B. Co. v. Perry*, 11 Ill. 467; *Montgomery v. Elliott*, 6 Ala. 701; *Dougherty v. Western Bank*, 13 Ga. 287; *McKenney v. Whipple*, 21 Maine, 98, where *Tenney*, J. said: "It is settled so far beyond dispute that authorities are not thought necessary to be cited, that a note payable on demand generally is payable everywhere, and a suit can be maintained, though not preceded by a demand. A previous demand, then, in this State, is unnecessary on a note payable at a particular place on a day certain; and also on a note payable on demand generally. In the former, proof that the debtor was prepared at the place and on the day when payment was to be made to discharge the note if presented, and bringing the money into court, would be a bar of damages, and entitle him to costs. Why should a different principle be made to apply to the note containing in itself both the terms, which may be disregarded in a note which contains one or the other, but not both? Is there any more necessity for the protection of the debtor's interests and rights, that a demand should be made when both exist together than when they may be in two notes between the same parties? Are reasons to be found in one case inapplicable in the other? The authorities which have been cited from English books to support the views taken by the defendant's counsel establish there a doctrine which is not recognized here. Is the maker of a note, payable at his own residence on demand, in a situation to be injured by being called upon to answer to an action commenced upon it, without a previous demand, more than he would be upon one payable at the same place on a day certain? In the latter case he is, to be sure, only to provide himself with the means of payment on the day upon which he engaged to make it; and by doing so he is secure from injury. When, for instance, he engages to pay on demand at his residence, he is subjected to the additional risk of being called upon when he may not have provided for the exigency; to be certain of exemption from costs, he must be constantly in funds to meet the note, inasmuch as he would not be entitled to notice of the time when the presentment of the note would be made; and immediately after a default on his part to meet the demand made according to the terms of his engagement, he would be liable. He could not insist upon a day or an hour in which to provide the means of discharge. But this additional risk he has voluntarily taken upon himself, and therefore he must ask no indulgence on that account. If the ac-

the defence is more difficult in the one case than in the other does not avail, because the defendant has taken upon himself the additional risk, and the hardship, if any, is one of his own creation.

It seems to be settled, that, in order to charge the indorser of a note, a demand at the place designated is necessary, and must be averred and proved.<sup>(o)</sup> The reason given is, that his liability is

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tion is brought without a previous demand at his residence, the bringing the action would be the demand, as in cases when the note is payable on demand generally; and proof of a readiness to discharge the obligation at his residence on the day of the commencement of the suit, and bringing the money into court, would be a bar to damages, and would entitle him to his costs in the same manner as on a note payable at a certain day at his residence. We are unable to see wherein he would not be equally protected in the one case as in the other, excepting so far only as his own contract may require him to be constantly ready in one, and only on a particular day in the other. The restriction cannot be regarded as useless in one more than on the other. It may be, and often is, a great benefit to the maker of a note to be allowed to pay it at a place where he may be possessed of the means, and if he be thus possessed according to his engagement, he does not suffer. And it is not seen in what manner he would be prejudiced in such a note as the one now under consideration by a want of presentment, more than in one payable on a day certain. On the hypothesis that a demand is necessary on a note like the one before us, the demand could be of no utility to the debtor, if unprovided with the means of payment. . . . . From the whole examination which we have been able to make of the authorities bearing upon the question, and the consideration which we have given the subject, we are satisfied that a decision in favor of the defendant in this case would be virtually a denial of the soundness of the reasons which sustain the law that is here settled, that a presentment is unnecessary on a note payable at a particular time and place." The same was held with reference to a note payable on demand after a fixed time, in *Gammon v. Everett*, 25 Maine, 66. But the law has been changed in Maine, by statute, *supra*, note *m*. In *Cook v. Martin*, 5 Smedes & M. 379, the distinction was adverted to; but it was held, that, whatever might be the rule with reference to notes on demand, no demand at the place was necessary to charge the maker of a note payable on demand five months after date. In *Dougherty v. Western Bank*, 13 Ga. 287, an opinion is expressed that a demand is necessary in the case of a bank-bill payable on demand at a designated place, but none can be required on a note payable under like conditions. The reason given for the distinction is public policy. The distinction is expressly denied in *Bank of North Carolina v. Bank of Cape Fear*, 13 Ired. 75, which holds that a demand is necessary in both cases; and *Haxtun v. Bishop*, 3 Wend. 1, *Montgomery v. Elliott*, 6 Ala. 701, were actions on bank-bills, and held that a demand was not essential, putting promissory notes and bank-bills upon the same footing.

(o) In *Bank of U. S. v. Smith*, 11 Wheat. 171, it was held, that, in an action against an indorser, on a note payable at a particular bank, the bank not being the holder, an averment of a demand at that bank is indispensable. But where the bank is the holder, an allegation that the note was presented to the maker and payment refused, under which competent evidence of a demand was introduced at the trial without objection, is so far sufficient that the judgment will not be reversed. *Thompson, J.*, after intimating an opinion that such averment would not have been necessary if the defendant had



conditional, while that of the maker and acceptor is absolute. But when a note is payable at a bank, and the bank itself is the holder, it has been held that an averment of presentment to the maker generally was sufficient. (*p*)

been the maker, said: "But when recourse is had to the indorser of a promissory note, as in the present case, very different considerations arise. He is not the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditional that if, upon due diligence having been used against the maker, payment is not received, then the indorser becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiff's title and right of recovery against the indorser. And when, in the body of the note, a place of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. And whenever a note is made payable at a bank, and the bank itself is not the holder, an averment and proof of the demand at the place appointed in the note are indispensable." The same was held in *Bank of Wilmington v. Cooper*, 1 Harring. Del. 10; *Watkins v. Crouch*, 5 Leigh, 522; *Hartwell v. Candler*, 5 Blackf. 215, but this, it will be observed, was an Indiana case, where the law is stated to be different from the other States; *Smith v. M'Lean*, 2 Taylor, N. Car. 72; *Nichols v. Pool*, 2 Jones, N. Car. 23. In *North Bank v. Abbot*, 13 Pick. 465, a suit against an indorser, *Shaw*, C. J. said: "Where a note is made payable at a particular bank, or other place certain, it has long been held, and is now well settled, not only that the holder is not bound to present it to the promisor at any other place, but that a presentment at any other place would be unavailing; a promisor would be under no obligation to pay it at another place, and of course a refusal to pay upon such presentment would be no dishonor upon which the indorser could be charged. *Berkshire Bank v. Jones*, 6 Mass. 524; *Woodbridge v. Brigham*, 12 id. 405, corrected in 13 id. 556." If this language is not to be considered as referring to an indorser, it is incorrect, so far as it relates to the point that a presentment at any other place is unavailing. The statement appears to be too broad. In *Shaw v. Reed*, 12 Pick. 132, the court said that the excuse for non-presentment to the maker, that he had absconded, did not apply when the note is payable at a time and place certain; "that an actual or virtual demand must be made at that place, and notice of non-payment there must be given to the indorser in order to charge him; and it was resolved, that, as the note in suit was not at the bank on the day on which it became due, no legal demand was made, and therefore the defendant was discharged from liability as indorser." See *Carley v. Vance*, 17 Mass. 389, *Wilde*, J.; *Woodbridge v. Brigham*, 13 id. 556, *Parker*, C. J. In *Seneca Co. Bank v. Neass*, 5 Denio, 329, *McKissock*, J. said: "There was, it is true, a defect in the certificate, as it did not state where the demand of the note was made; but this difficulty was obviated by the oral testimony of the notary, which showed that it was at the banking-house of the plaintiffs, the place of payment." See *Woodworth v. Bank of America*, 19 Johns. 391, 405, *Kent*, Ch.; *Bacon v. Dyer*, 3 Fairf. 19, *Weston*, C. J.; *Hart v. Green*, 8 Vt. 191, *Phelps*, J.; *Allen v. Smith*, 4 Harring. Del. 234, *Booth*, C. J. See also the cases of *Sullivan v. Mitchell*, 1 N. Car. Law Rep. 482, *Taylor*, C. J.; *Irvine v. Withers*, 1 Stew. Ala. 234, *Suffold*, J.; *Roberts v. Mason*, 1 Ala. 375; *Montgomery v. Elliott*, 6 id. 701, *Ormond*, J.; *Glasgow v. Pratte*, 8 Misso. 336.

(*p*) *Bank of South Carolina v. Flagg*, 1 Hill, S. Car. 177; *Bank of U. S. v. Smith*, 11 Wheat. 171, *supra*, note *c*.



It has been held that a presentment at a different place from the one at which the note was payable, and an absolute refusal by the maker to pay, and a statement that any further presentment at the place specified would be useless, because there were no funds there, was not sufficient to charge an indorser.(q)

So where a note payable at one bank was, with the consent of an indorser, negotiated at another, a demand at the latter bank was held insufficient to charge the indorser, although it was proved that the maker had no funds at the bank where the note was payable.(r)

We are not aware that the necessity of such averment and proof to charge the drawer and indorser of a bill has been adjudged except in a very few of the reported cases in this country; but as to the proof, it must be as essential where the drawer or indorser of a bill is sought to be charged, as where the question is concerning the liability of an indorser of a note.(s) Whether

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(q) *Smith v. M'Lean*, 2 Taylor, N. Car. 72.

(r) *Watkins v. Crouch*, 5 Leigh, 522.

(s) *Tuckerman v. Hartwell*, 3 Greenl. 147, is the only case which has been found where the liability of a drawer, in this respect, has been distinctly discussed. The bill was accepted to pay in Boston, and the words, "A. F. Howe & Co." were written at the lower left-hand corner, but were not plainly legible. The plaintiff insisted that these words formed no part of the acceptance; and as the bill was accepted payable in Boston, that they were only bound to prove that it was in Boston at maturity, and that due notice was given to the drawer of its dishonor. But the judge, at *Nisi Prius*, instructed the jury, if they should find that the words "A. F. Howe & Co." were placed upon the bill by the acceptor at the time of the acceptance, and intended to designate the place at which the bill should be presented for payment, and that the plaintiffs, the indorsers, knew that it was so intended, and where the place was, that it was incumbent on the plaintiffs to prove a demand at the place. The jury found for the defendant, and a new trial was refused. It may be observed, however, with reference to this case, that *Mellen, C. J.*, after adverting to the difference between the liability of an acceptor and that of a drawer or indorser, said: "The line of distinction, however, is not drawn with clearness, and therefore we have not founded our opinion upon it, though there seem to be good reasons for the distinction." In *Story on Bills*, § 355, it is laid down, that "if the bill be made payable at a banker's, or other particular place, and accepted accordingly, it should be presented for payment at that place at its maturity, otherwise the drawer and prior indorsers will be discharged." In *Story on Prom. Notes*, § 230, it is said that the English and American authorities "are entirely in coincidence on the point that it is indispensable, in order to charge the indorser or the drawer, that a presentment for payment should be made not only at the place, but also on the very day of the maturity of the note or bill, otherwise the indorser or drawer will be absolutely discharged." In *Edwards on Bills*, 496, it is stated, that, "when a bill or note is

the distinction mentioned above, which the English courts seem to have taken between the necessity of an averment where the bill is drawn payable at a place certain, and its non-requirement where the acceptance alone is so payable, would be followed, may be doubted.

There can be no such distinction in this country as that which exists in England with reference to the liability of the *maker*, where the place of payment is mentioned in the body of the note, and where it simply constitutes a memorandum at the foot; because if the maker is liable without a presentment in the former case, he must be in the latter. This question might arise, however, with respect to the liability of an indorser of a note, or of a bill, with such a memorandum at the foot of the acceptance, or possibly of an acceptor who has accepted generally the bill drawn with the memorandum beneath the signature of the drawer. But it may well be doubted whether, independently of the question of alteration, the distinction adverted to is not more nice than sound; and it has a tendency to create confusion and uncertainty on this subject, already overburdened with niceties and refinements.<sup>(t)</sup> Where there is any difference between the law of the place where a note or bill is made, and that which exists where payment is to be demanded, the law of the latter, which must be pleaded and proved like any other fact, will govern.<sup>(u)</sup>

Whatever difference there may be in the cases, as to the *necessity* of a demand at the place specified, it is perfectly clear that, so far as place is concerned, a presentment there by the holder is always sufficient. And this is true, whether

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drawn payable at a place named, it is essential to show, in an action against the drawer or indorser, a presentment at the place appointed." None of the American cases cited by the learned author, however, on this point, are direct decisions respecting drawers or indorsers of bills.

(t) In *Tuckerman v. Hartwell*, 3 Greenl. 147, the distinction is denied. The facts in this case will be found *supra*, note s. But in *Pierce v. Whitney*, 29 Maine, 188, 195, *Shepley*, J. said: "The place of payment must be stated in the body of the note, to make it payable at that place." "A written memorandum of such a place at the foot, or on the margin of the note, has been adjudged to be insufficient." These are mere *dicta*, however. The point was touched upon in *Fletcher v. Blodgett*, 16 Vt. 26, where it was said to be an open question. The subject of the effect of a memorandum, in general, is treated elsewhere.

(u) *Pryor v. Wright*, 14 Ark. 189.

the liability of the indorser, (*w*) maker, (*x*) drawer, (*y*) or acceptor (*z*) is concerned.

Nor in such case is it necessary for the maker himself, or his agent, to make any formal demand, for it is sufficient if the note is at the place on the day of maturity, ready to be delivered up to any party who may be entitled to it on payment of the amount due; and if, at the close of business hours, the note or bill is still unpaid, these facts alone constitute a dishonor, and the requisite

(*w*) In *Saunderson v. Judge*, 2 H. Bl. 509, the place of payment was mentioned in a memorandum, and yet a demand there was held sufficient. In *Bank of U. S. v. Carneal*, 2 Pet 543, *Story*, J. said: "Where a note is payable at a bank, it is not necessary to make any personal demand on the maker elsewhere. It is his duty to be at the bank within the usual hours of business to pay the same, and if he omits so to do, and a demand is there made of payment by the holder, within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor." *Berkshire Bank v. Jones*, 6 Mass. 524; *Woodbridge v. Brigham*, 13 id. 556, 12 id. 405; *Bank of Utica v. Smith*, 18 Johns. 230; *Anderson v. Drake*, 14 id. 114, 117, by *Thompson*, C. J., who said: "The settled law now is, that a demand of payment at the place where the note is made payable is enough to charge the indorser. *Gale v. Kemper*, 10 La. 205; *Commercial, &c. Bank v. Hamer*, 7 How. Miss. 448; *Coe v. Hunt*, 2 Smedes & M. 227; *Harrison v. Crowder*, 6 id. 464; *Goodloe v. Godley*, 13 id. 233; *Rahm v. Philadelphia Bank*, 1 Rawle, 335; *Jenks v. Doylestown Bank*, 4 Watts & S. 505, where it was held, that a statement in the protest of a demand at the bank was, *prima facie*, sufficient; also, that it need not be shown that the cashier was at the bank during the whole of business hours, because the presumption is that he performs his duty. See *Bank of South Carolina v. Flagg*, 1 Hill, S. Car. 177. In *De Wolf v. Murray*, 2 Sandf. 166, the holder went to demand payment of the acceptor of a bill directed to the latter, "at the office of H. O. Collard, No. 18 Chapel Walks, Liverpool," and found the office shut, and no one there to answer. Held a sufficient presentment to charge an indorser. See also *infra*, note *y*. *Bank of Syracuse v. Hollister*, 17 N. Y. 46, where the teller, who was also a notary, took the note to the bank at about 6 P. M., and finding it shut, as notary, demanded payment of himself, as teller. He knew that there were no funds in the bank. Held sufficient.

(*x*) *Lyon v. Williamson*, 27 Maine, 149, where the maker was ready at the time and place, and the holder was not there to receive the money, but subsequently made a demand at the place, and was not able to obtain payment. Held sufficient. *Stedman v. Gooch*, 1 Esp. 3.

(*y*) *Supra*, notes. In *Evans v. St. John*, 9 Port. Ala. 186, the drawer of a bill payable at a bank, in a suit against him, offered evidence to prove that he had deposited in the hands of the acceptor, at the maturity of the bill, funds more than sufficient to meet it. Held, that, inasmuch as a proper demand had been made at the bank, the evidence was inadmissible, because immaterial. In *Hine v. Allely*, 4 B. & Ad. 624, the acceptor accepted generally a bill directed to him at No. 6 Budge Row, Watling St. Held, that an averment of presentment to the acceptor was supported by proof that the holder went to the place mentioned to present the bill, and found the house shut up, and no one there. The subject how far this fact constitutes an excuse will be treated *infra*.

(*z*) *Foden v. Sharp*, 4 Johns. 183; *McClane v. Fitch*, 4 B. Mon. 599.

notice may be given forthwith to the proper parties.(a) It is usual, however, in such instances, to have a formal presentment and refusal made. We do not regard this as necessary.(b)

In some cases an examination of the accounts of the maker has been made, in order to ascertain whether the bank or banker at whose place of business a note has been made payable has any funds with which to pay the note.(c) But this is clearly unnecessary, where it is proved by any competent evidence that no funds were there to meet the note, and that no one came to pay it.(d) And unless the bank or banker is the owner of the note, and not merely the holder for collection, it may well be doubted whether the mere fact that the bank or banker had funds of the maker in its possession would constitute any defence for the

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(a) *Saunderson v. Judge*, 2 H. Bl. 509; *Fullerton v. Bank of U. S.*, 1 Pet. 604; *Bank of U. S. v. Carneal*, 2 id. 543; *Berkshire Bank v. Jones*, 6 Mass. 524; *Folger v. Chase*, 18 Pick. 63; *Nichols v. Goldsmith*, 7 Wend. 160; *Ogden v. Dobbin*, 2 Hall, 112; *Woodin v. Foster*, 16 Barb. 146; *Gillett v. Averill*, 5 Denio, 85; *Allen v. Miles*, 4 Harring Del. 234; *Graham v. Sangston*, 1 Md. 59; *Hunter v. Van Bomhorst*, id. 504; *Goodloe v. Godley*, 13 Smedes & M. 233. These were cases against an indorser *Maurin v. Perot*, 16 La. 276, an action against a maker; *State Bank v. Napier*, 6 Humph. 270, an action against a bank for neglect of duty, by which it was claimed that the indorsers of a note deposited there were discharged

(b) In *Ogden v. Dobbin*, 2 Hall, 112, *Oakley, J.* said: "There was no necessity for the cashier to make any other demand. His subsequent delivery of the note to a notary, and his personal demand on the makers, was probably by way of greater caution, and was clearly unnecessary." So in *Gillett v. Averill*, 5 Denio, 85, where the only evidence of presentment was, that the teller, on the day of maturity, drew the note from the package where it was kept, and, knowing that the maker had no funds in the bank, he gave notice to the indorser, without any formal demand of payment, or any actual examination of the maker's account. The defendant moved for a nonsuit, which was denied. *Whittlesey, J.* said: "The presentment for payment was sufficient. It is understood to be the custom of banks holding promissory notes payable at their own counter to wait, on the day of the maturity of the note, until the close of business hours, and then, if the maker has no funds, to give notice of non-payment, without making any other demand of payment. This custom is sanctioned by judicial decisions. It may be usual for the teller, or other officer, to inquire of the book-keeper if the maker has any funds; but in this case such inquiry was unnecessary, as the teller swore that he knew there were no funds in the bank to pay the note. No formal demand, or unmeaning proclamation, at the close of banking hours for the day was necessary, or is ever necessary, in such cases." *Fullerton v. Bank of U. S.*, 1 Pet. 604, *infra*, note *f*; *Shaw, C. J.*, *Gilbert v. Dennis*, 3 Met. 495, 497.

(c) *Saunderson v. Judge*, 2 H. Bl. 509; *Maurin v. Perot*, 16 La. 276; *Bank of South Carolina v. Flagg*, 1 Hill, S. Car. 177.

(d) *Gillett v. Averill*, 5 Denio, 85, *supra*, note *b*; *State Bank v. Napier*, 6 Humph. 270, where the judge at *Nisi Prius* instructed the jury that such examination was necessary, and the charge was held to be erroneous; *Fullerton v. Bank of U. S.*, 1 Pet. 604, *infra*, note *f*.

indorser; because this would give no right to appropriate the money to the payment of the note, without the direction of the promisor, and the consent of the bank or banker, or some usage of trade or custom to that effect.(e) But if the bank or banker, in such case, has become the owner, by discount or purchase, the circumstances just mentioned might perhaps furnish a defence.(f)

It is not necessary for the holder to show that the note was in the hands of the officer of the bank whose duty it was to receive payment; (g) nor even if it were proved that it was not in his hands, would this fact be material, provided the note was in the bank, and was unpaid.(h) If the note were in the bank, the presumption is that the proper officer could have obtained it; and if the note is the property of the bank, the plaintiff need not prove that it was at the bank, the presumption being that the note was there, and the burden of proof is upon the defendant to show that the maker called for the purpose of paying it.(i)

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(e) We have found no authority to this effect, but it would seem that there can be no doubt of the proposition. But *Story, J.*, in *Bank of U. S. v. Carneal*, 2 Pet. 543, said: "If the bank has funds of the maker in its hands, that might furnish a defence to a suit brought for non-payment. But this is properly matter of defence to be shown by the party sued, like any other payment, and not matter to be disproved by the bank, by negative evidence." It may be, however, that the bank in this case was the owner of the note. The suit was brought, it will be seen, in the name of the bank. See *Fullerton v. Bank of U. S.*, *infra*, note f.

(f) See *Bank of U. S. v. Carneal*, 2 Pet. 543, *supra*, note e. In *Fullerton v. Bank of U. S.*, 1 id. 604, the judge, at *Nisi Prius*, charged the jury, "that, on a note made payable at a particular bank, it is sufficient to show that the note had been discounted and become the property of the bank, and that it was in the bank, not paid at maturity." The defendants excepted, and it was held that the charge was as favorable to them as they had a right to claim. *Johnson, J.* said: "Nothing more than this could have been required by the court; for the positive proof that the bill was not paid will certainly imply that there were no funds of the drawer there to pay it. The fact could not have been made more positive by inspection of the books. The charge is, perhaps, too favorable to the defendants, since modern decisions go to establish that, if the note be at the place on the day it is payable, this throws the onus of proof of payment upon the defendant. This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts." See *Gillett v. Averill*, 5 Denio, 85, *supra*, note b. See also the cases of *Allen v. Miles*, 4 Harring. Del. 234; *Maurin v. Perot*, 16 La. 276. The language used in these cases is, that it is sufficient if the note is at the place, and there were no funds of the maker there.

(g) See *Jenks v. Doylestown Bank*, 4 Watts & S. 505, *supra*, p. 435, note w; *Folger v. Chase*, 18 Pick. 63, *infra*, note i.

(h) *State Bank v. Napier*, 6 Humph. 270.

(i) *Berkshire Bank v. Jones*, 6 Mass. 524; *Folger v. Chase*, 18 Pick. 63, where

If the holder, on the day of maturity, finds the place of payment closed, it has been held that he is not bound to make any further demand to charge either drawer (*j*) or indorser. (*k*)

If at that time the acceptor be dead, a presentment at such place has also been held sufficient to charge a drawer. (*l*)

If the office at which payment was to have been made has ceased to exist previous to and at the maturity of a note, no demand at all has been held necessary, (*m*) even where the bank has been sold to another similar corporation, which was made the agent of the bank for settling its affairs of discount and deposit. (*n*)

Where a note is made payable at any or at either of the banks of a city or town, the holder has a right to elect at which bank

*Wilde, J.* said: "No demand was necessary except at the bank; and although there is no express proof that the notes were there, and some officer of the bank in attendance, at the times the notes fell due, yet this must be presumed, and it was for the defendants to show that the makers called at the place appointed for the purpose of making payment. The testator by his indorsements guaranteed that the makers would respectively be at the bank and pay the notes according to their tenor."

(*j*) *Hine v. Allely*, 4 B. & Ad. 624, *supra*, p. 435, note *y*.

(*k*) *De Wolf v. Murray*, 2 Sandf. 166, *supra*, p. 435, note *w*.

(*l*) *Philpott v. Bryant*, 3 Car. & P. 244, 4 Bing. 717, 1 Moore & P. 754, *supra*, p. 427, note *d*.

(*m*) *Erwin v. Adams*, 2 La. 318; *Roberts v. Mason*, 1 Ala. 373. See *Central Bank v. Allen*, 16 Maine, 41, *infra*, note *n*.

(*n*) *Roberts v. Mason*, 1 Ala. 373. *Collier, C. J.* said: "The contract of indorsement was, in law, an agreement on the part of the defendant to pay to the plaintiff, if the note should be duly presented for payment at the office of discount and deposit of the Bank of the United States at Mobile, and legal notice be given him of the default of the makers, in the event of their failure to provide for it. One of the conditions on which the liability of the defendant depended, it became impossible to perform, in consequence of the office of discount and deposit ceasing to exist previous to the maturity of the note. But it is not pretended that that occurrence was produced by the instrumentality of the plaintiff, and it cannot be held to interpolate the contract of indorsement, so as to make the indorser's liability depend upon the performance of a condition by the indorsee which did not constitute a part of the original contract." But in *Central Bank v. Allen*, 16 Maine, 41, a case where the bank at which the note was payable had ceased to exist, and its place of business was occupied by another bank, without any arrangement by the latter as to settling up the business of the former, the court seemed disposed to think that presentment should still be made. *Weston, C. J.* said: "And we are inclined to the opinion that the Branch Bank having ceased to operate, if their banking-house had not been occupied by a similar institution, presentment would have been excused. If this was the place of demand, and upon the facts we think it was, there is evidence of a sufficient presentment at that place." A demand was, it will be seen, made at the latter bank, and the defendant contended that it ought to have been made on the maker at his place of business or of residence; but the court held the demand sufficient.



he will make the presentment, and a demand there will be sufficient.*(o)* This rule is applicable equally to places where there are many banks, as to those in which there are only a few.*(p)* An opinion seems to have been entertained, that where there are several banks in a large city, the holder is bound to give notice to the promisor where his note is ; *(q)* but this must now be considered as overruled.*(r)* The reason given is, that the stipulation as to the place of payment was not made for the benefit of the maker, but of the holder ; and to require notice to be given where the note is, would in many cases be more difficult to prove than an actual presentment to the maker on the day of payment.*(s)*

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*(o)* *Malden Bank v. Baldwin*, 13 Gray, 154, a suit against the indorser of a note payable "at bank in Boston" ; *North Bank v. Abbot*, 13 Pick. 465, an action against the indorser of a note payable "at either of the banks in Boston" ; *Jackson v. Packer*, 13 Conn. 342, a suit against the acceptor of a bill payable "at either bank in Providence" ; *Langley v. Palmer*, 30 Maine, 467, an action against the indorser of a note payable "at any bank in Boston" ; *Page v. Webster*, 15 id. 249, a suit against the indorser of a note payable at "either of the banks in Portland."

*(p)* In *Langley v. Palmer*, 30 Maine, 467, a distinction was attempted to be drawn on this ground between that case and *Page v. Webster*, 15 id. 24, but the court overruled it, saying that "the principle is applicable equally to a note payable in Boston as in Portland."

*(q)* *Shaw, C. J.*, *North Bank v. Abbot*, 13 Pick. 465 : "It would seem to follow, from other established rules, that, in such case, the holder should give notice to the promisor where his note is. But of this it is not necessary to give any opinion in the present case, because it was proved that, in fact, the promisor had notice that his note was in the North Bank."

*(r)* *Malden Bank v. Baldwin*, 13 Gray, 154 ; *Jackson v. Packer*, 13 Conn. 342, where *Waite, J.* said that the notice "was not required by the express terms of the bill, nor has any local usage upon that subject been shown, and we know of no rule of law requiring it. If the parties wish for more certainty as to the place of payment, let them be more explicit in the bill." *Langley v. Palmer*, 30 Maine, 467 ; *Page v. Webster*, 15 id. 249

*(s)* *Bigelow, J.*, *Malden Bank v. Baldwin*, 13 Gray, 154. In *Page v. Webster*, *Shepley, J.* said : "This form of a note has been introduced into this part of the country within a few years, and it may aid in determining the rights and duties of the parties to inquire at whose instance the note must have been so formed. It is not easy to perceive what benefit the maker would derive from a note in that form, unless it were made by a banker or banking-house, in which case there might be hope of advantage from an increased circulation. While the maker ordinarily could derive no advantage from such a form, he might justly apprehend some inconvenience in looking up the note to pay it. For, as it regards him, it is quite clear that the holder, by the law in this and most of the other States, is not obliged to have it at the place where payable. A readiness to pay at the appointed place is matter in defence only. It is not, therefore, probable that it was so formed for his interest or accommodation. To the payee it might be of advantage. He might be desirous of making use of the note in the mar-



Where a note is payable at two places, the holder has a right to present it at either he may choose ; (t) and if a bill be payable in a city, and the acceptor has no residence or place of business there, it will be sufficient to charge the drawer if the bill is in the city at the day of maturity, ready to be delivered up to the acceptor if he should come to pay it.(u)

If a bill is drawn on a person residing in one place, payable in another, it is said that, in case of an acceptance and subsequent refusal by the acceptor to pay, the latter is the proper place in

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ket, or at a banking-house, to obtain the money before it became due. It would be convenient to have it payable at a bank, to save the risk and trouble of a presentment to the maker. And if made payable at a particular bank, it would not be so readily received at other banks, because it would subject them to the risk and trouble of being watchful for the day of payment, and of sending it to the bank where payable for presentment. It would be natural for business men to endeavor to obviate this difficulty, so as to enable them the most readily to obtain cash for the note at any bank, not being limited to one, where funds were to be loaned. A note payable at any bank in a place would therefore be desirable to the payee, and it is but reasonable to conclude that such a form was introduced for his convenience and interest. And if so, does it not show that the intention of the parties was to relieve the payee or holder from risks and troubles to which he might be subjected if made payable at any one bank only ? And if such were the intentions of the parties, they can only be carried into effect by requiring the maker to look for his note at all the places where he promises to pay it. For to require the holder to give the previous notice now insisted upon, would not only defeat the object of relieving from trouble and risk, but would subject to much greater than if made payable at one bank only. The maker's express promise to pay at any one of several places would indicate to a common mind the duty to act according to what is supposed to have been the intention of the parties, and to look at all the places for it, or have funds there when it became due. And as respects his own liabilities, it has already been seen that he must do it to relieve himself from the danger of costs, or at least must show in defence a readiness at some place named. The payee never could have designed, by receiving a note in that form, to have incurred the responsibilities now supposed to attach to it, yet if there is any rule of law so clearly settled and well established as to decide the legal construction which ought to be given to a contract in that form, the parties must be supposed to intend to conform to it."

(t) *Beeching v. Gower*, Holt, N. P. 313, where the note was payable at Maidstone, and at Ramsbottom & Co.'s, London.

(u) *Boot v. Franklin*, 3 Johns. 207, where the bill was payable in London, and the declaration stated that the bill not being paid, and the holders, not knowing where to present the same for payment in London, caused the same to be protested. *Kent*, C. J. said : " Nor were the holders bound to go elsewhere to seek the drawees, as the bill had directed the payment to be in London. They conformed their conduct to the tenor of the bill. They were in London on the day of payment, ready to receive payment, and they did all that they were enabled to do ; they caused the bill to be there protested. The declaration in this case also states sufficient to entitle the plaintiffs to recover." See also *Mason v. Franklin*, 3 Johns. 202. *Bigelow, J., Malden Bank v. Baldwin*, 13 Gray, 154.

which to make presentment.(v) But where a bill drawn in this way had been accepted for the honor of the payee, "if regularly protested and refused when due," a presentment in the place where the drawee resided, without any at the place where the bill was drawn payable, was held to be sufficient.(w)

The fact that a note is dated at a certain place, it need hardly be necessary to remark, does not make the note specially payable there.(x) It may have the effect of leading a holder, who has

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(v) Story on Bills, §§ 282, 353. See Chitty on Bills, 10th Lond. ed., 240. But in *Mason v. Franklin*, 3 Johns. 202, a bill drawn on a person at Liverpool, payable in London, was protested for non-acceptance in Liverpool, and afterwards for non-payment at the same place. *Kent*, C. J., after remarking that a good cause of action had arisen on the protest for non-acceptance, said: "But we are of opinion that, as no place of payment in London was designated, the demand for payment and protest for non-payment were well made upon the drawees personally at Liverpool. It would have been a very idle act for the holder to have gone into London to make inquiry, when no place in London was pointed out in the bill, and when the drawees resided at Liverpool, and had refused to accept the bill. The law merchant has not pointed out any particular spot in London for such inquiries, and to have attempted it at large would have been the height of absurdity. The common law in general, and especially the commercial law, which forms a distinguished branch of it, is founded on the principles of utility and common sense; and it would be truly surprising, and repugnant to the very spirit of the system, if an inquiry so senseless was requisite to consummate the right of the holder of the bill. It must be a sound rule, that where no particular place of payment is fixed, a demand upon the drawee personally is good. A general refusal to pay, was a refusal to pay according to the face of the bill. It was equivalent to a refusal to pay in London. We do not mean to say that the demand of payment at Liverpool was indispensable. The bill being payable at London, it would have been sufficient for the holder to have been there when the bill fell due, ready to receive payment. In the present case a protest at London, or a demand and protest at Liverpool, were sufficient, and the holder might take either course. The holders elected to demand payment of the drawers personally at Liverpool, and to cause the bill to be protested there, and the plaintiffs accordingly did all that in reason or law can be required to fix the antecedent parties to the bill."

(w) *Mitchell v. Baring*, 10 B. & C. 4. In Chitty on Bills, 10th Lond. ed., 241, it is said: "This case, though decided upon the peculiar form of the acceptance, and therefore not involving the general question as to the usage and custom of merchants, was nevertheless considered as sufficiently casting a doubt upon the validity of the previous practice to require the interference of the legislature; and accordingly the Act of 2 & 3 Wm. IV. c. 98, was passed." By the terms of this statute, such a bill as that in *Mitchell v. Baring* may, without further presentment to the drawee, be protested for non-payment at the place where it is payable.

(x) *Lightner v. Will*, 2 Watts & S. 140. In *Taylor v. Snyder*, 3 Denio, 145, *Beardsley*, J. said: "The date of a note at a particular place does not make that the place of payment, or at which payment should be demanded for the purpose of charging the indorser. This was expressly adjudged in the case of *Anderson v. Drake*, 14 Johns. 114. . . . It has been supposed that the case of *Stewart v. Eden*, 2 Caines, 121, countenances a different doctrine. *Livingston*, J. there said: 'The notes being dated in

no knowledge of the place of residence or business of the maker, to suppose that he might be found there.<sup>(y)</sup> Perhaps it may be said, generally, that the date of a certain place raises the presumption that the paper is payable, and therefore to be demanded, at that place.

## SECTION VII.

### EXCUSES FOR ABSENCE OF DEMAND OF PAYMENT.

WE have already stated that all the parties subsequent to the principal payor are only as his guarantors, and promise to pay only on condition that a proper demand of payment be made, and due notice be given to them in case the note or bill is dishonored. And we repeat this as one of the fundamental principles of the law of negotiable paper; and the infrequency and the character of the circumstances which will excuse the holder from making the demand, and still preserve to him all his rights as effectually as if it were made, will illustrate the stringency of the rule itself.

The only general and universal rule which can be laid down with respect to demand is, that in all bills of exchange, the

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New York, the maker and indorser are presumed to have resided and contemplated payment there.' This remark was in part strictly correct, for the date of the note was presumptive evidence of residence; and in a general sense it may also be true that the date raises a presumption that the parties contemplated payment at that place. Judge Livingston did not say that the note was, by law, payable at the place of its date; on the contrary, the form of expression conclusively repels that idea. He was not speaking of what the parties were bound to do by the terms of the note, of their legal obligations flowing from the engagement as maker and indorser, but simply of what they were presumed to have contemplated. . . . There is nothing, therefore, in this remark of Judge Livingston which can be made to countenance the idea that a note, when no other place of payment is specified, is by law payable at the place of its date. *Anderson v. Drake*, 14 Johns. 114, *supra*; *Bank of America v. Woodworth*, 18 Johns. 322." In *Fisher v. Evans*, 5 Binn. 541, *Tilghman*, C. J. said: "I can find no such principle as that for which the plaintiff in error contends, that the place where the bill is drawn must be taken to be the residence of the drawer." *Galpin v. Hard*, 3 McCord 394. See *Burrows v. Hannegan*, 1 McLean, 309. But see the cases cited *infra*, p. 458, note *a*, where a different doctrine seems to be laid down.

<sup>(y)</sup> *Whitman*, C. J., *Pierce v. Whitney*, 22 Maine, 113, 29 id. 188. See the cases cited *supra*, p. 441, note *x*; *Duncan v. McCullough*, 4 S. & R. 480; *Nailor v. Bowie*, 3 Md. 251.

holder, in order to recover of the drawers or indorsers, "must prove a demand of, or due diligence to get the money from, the acceptor"; (z) and in all actions upon promissory notes by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the maker of the note. (a)

The question of excuse, then, will depend upon the fact whether due diligence has been used to find the maker or acceptor, and presents the ordinary inquiry as to negligence. That question may, and often does, depend on such a variety of circumstances, that it is very difficult, if not impossible, to reduce them to any fixed or invariable rule. (b) When there is no dispute about the facts, due diligence is a question of law for the court to determine; (c) and where the facts are controverted, or the proof equivocal or contradictory, it would seem to be a mixed question of law and fact. (d)

The principal excuses resolve themselves into two classes: First, the impossibility of demand. Second, the acts, words, or position of a party, proving that he had no right, or waived all right, to the demand, of the want of which he would avail himself.

### 1. *Where the Demand for Payment cannot be made.*

That impossibility should excuse non-demand is obvious; for the law compels no one to do what he cannot perform. But it must be actual, and not merely hypothetical; and though it need not be absolute, no slight difficulty will have this effect.

We have already considered the law of demand with reference to the person by whom it is to be made, of whom it is to be made, and as regards the method, time, and place of making it. We will now consider the impossibility of presentment with reference to the same points, and afterwards with respect to other circumstances.

(z) Lord *Mansfield*, C. J., *Heylyn v. Adamson*, 2 Burr. 669, 678; *Kent, J.*, *Munroe v. Easton*, 2 Johns. Cas. 75.

(a) Lord *Mansfield*, C. J., *Heylyn v. Adamson*, 2 Burr. 669, 678.

(b) *Storrs, J.*, *Windham Bank v. Norton*, 22 Conn. 213, 221.

(c) *Wheeler v. Field*, 6 Met. 290, where the notary testified that he had used due diligence, and the jury, in reply to a question by the court, stated that they had found that due diligence was used; but the court set aside their verdict in favor of the plaintiff, and ordered a new trial. See *Orear v. McDonald*, 9 Gill, 350; *Cathell v. Goodwin*, 1 Harris & G. 468.

(d) See *Orear v. McDonald*, 9 Gill, 350; *Cathell v. Goodwin*, 1 Harris & G. 468.

If at the time a note or bill matures the holder is dead, and no executor or administrator is appointed, it is clear that no demand can be made at that time; and consequently this fact operates as an excuse, but not in general for an entire want of demand, but for a presentment at what would otherwise be the time required by law. The executor or administrator has a reasonable time after appointment in such cases within which to present the note or bill.(e) So where an agent with whom a note had been left for collection died four days before maturity, after an illness of more than a month, and about three weeks afterwards his executrix discovered the note locked up in his desk, where it had remained unknown to her, and caused it to be immediately presented, the indorser was charged.(f)

Where there is no person upon whom it is possible to make a demand, the indorser must of course be liable without one. As where a note was signed by an agent having authority so to do, and the note was subsequently indorsed, the principal being dead at the time the note was made and delivered, no demand was held necessary.(g) And the same would probably be held where the apparent maker was living, but the note was void against him,(h) on account of usury,(i) illegal consideration, or forgery; or where the maker was a married woman; or perhaps a minor, both at the time of making and of maturity; though some doubt might be entertained in the last case.(j) But cases may be im-

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(e) *White v. Stoddard*, 11 Gray,

(f) *Duggan v. King*, Rice, 239.

(g) *Burrill v. Smith*, 7 Pick. 291, where *Parker*, C. J. said: "In this case, one of the strong points of the argument for the defendant is, that there being in fact no promisor, the indorser, if compelled to pay, will have none to call upon to reimburse him. Also, that the common requisites of an action against indorsers cannot be complied with, for there can be no demand upon the promisor. But this will affect only the form of the declaration. The same difficulty — if it is one — will occur in the cases of void or voidable notes above mentioned; for a demand in such cases would be merely formal. The administrator of a deceased person, whose name appears to a note, may as well be called upon, in order to give an action against an indorser, as the person whose name is forged. An averment that, at the time of writing the note by the attorney for the principal, the principal was dead, would be sufficient to entitle the plaintiff to recover."

(h) *Chandler v. Mason*, 2 Vt. 193.

(i) *Copp v. M'Dugall*, 9 Mass. 1, where the evidence of the note being void was considered an admission or recognition of the illegality of the note by the indorser.

(j) See the remarks of *Parker*, C. J., *supra*, note g. The void or voidable notes just mentioned are notes void between promisors and payee, on account of usury

agined under almost any of the circumstances above mentioned, in which the maker has intimated a purpose of waiving such defence; and if so, it might be thought that a demand should be made of him. And if this be so, should not a demand be made, on the ground that, as the defence might be waived, the indorser had a right to insist that a proper effort should be made to ascertain whether the maker intended to make such waiver or avail himself of the defence? The authorities do not aid us much in answering all these hypothetical questions. But the nature and purpose of negotiable bills and notes, and the decisions, as far as they go, would lead us to lay down the rule, as at least generally applicable, that, wherever the maker has an unquestionable and certain defence in law, it will be the presumption of law that he will make this defence, and therefore there need be no demand of him. Nor is the indorser injured by this rule; for if the liability of the maker is wholly at his own option, he will be at liberty to pay the debt to relieve or indemnify the indorser, as for the immediate benefit of the holder, and so the indirect benefit of the indorser.

We have already seen, that, where the maker dies before the note matures, the general rule is, that demand should be made of his personal representatives; (*k*) consequently the death of the maker or acceptor is no excuse for non-presentment. And this is so even when the indorser whom it is sought to charge has been appointed administrator of the maker's estate. (*l*) But where there are no personal representatives, of course no demand can be made. Thus, where the maker and his whole family were drowned two days before the note matured, there being no will, and no administration having been taken out on the estate, it was held that no demand was necessary. (*m*)

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or other illegal consideration. So if the indorsement is made of a note made by a minor or of a *feme covert*, and even if the name of the promisor is forged. As regards voidable notes, a distinction might be made on the ground that the makers might pay, although they are not obliged so to do; and it might be said, that, in order to constitute due diligence on the part of the holder, he should make a presentment, to see if they would not honor the notes. The necessity of demand would, it is conceived, be still stronger where the maker has come of age before the note has matured; as circumstances might have happened amounting to a ratification.

(*k*) *Supra*, p. 364, note *x*.

(*l*) *Magruder v. Union Bank*, 3 Pet. 87; *Juniata Bank v. Hale*, 16 S. & R. 157.

(*m*) *Haslett v. Kunhardt*, Rice, 189, *Richardson*, J. dissenting.



But where an administrator has been appointed, and by law is entitled to a certain time within which to settle up the estate of the deceased, prior to the expiration of which he is not liable to be sued by any creditor of the estate, a demand upon him has been held to be excused, provided the note fall due within the time limited, but not otherwise. *(n)*

Where neither the maker nor his last and usual place of business or residence can be found, no demand need be made, but the holder must prove that he used due diligence to find them, and that his efforts proved unavailing. *(o)*

## 2. *Of Insolvency.*

As between the holder of negotiable paper and the prior parties thereto, the insolvency or bankruptcy of the maker or acceptor will constitute no excuse for want of demand. *(p)* The rule is the same whether the payor becomes insolvent between the time of indorsing the note and its maturity, *(q)* or is insolvent before and at the time of the indorsement, and his insolvency is known to the indorser when he puts his name upon the note. *(r)*

*(n)* *Supra*, p. 364, notes *y* and *z*.

*(o)* *Infra*, p. 448, note *d*.

*(p)* In *Russel v. Langstaffe*, 2 Doug. 514, 515, it was said by counsel in argument, that, "as to the bankruptcy, it had been frequently ruled by Lord Mansfield at Guildhall, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer or acceptor had become a bankrupt; as many means may remain of obtaining payment, by the assistance of friends or otherwise." But the case itself turned on another point. This statement, however, was recognized as law by Lord Ellenborough, in *Warrington v. Furber*, 8 East, 242; and in *Esdaile v. Sowerby*, 11 id. 114, he said: "It is too late now (1809) to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment or of notice of the dishonor." So, in *Nicholson v. Gouthit*, 2 H. Bl 609, *Eyre*, C. J. said: "It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice; but the rule is too strong to be dispensed with." See *Bowes v. Howe*, 5 Taunt. 30, 16 East, 112; *Sands v. Clarke*, 8 C. B. 751. So also *Parsons*, C. J., *Bond v. Farnham*, 5 Mass. 170; *Shaw v. Reed*, 12 Pick. 132; *Granite Bank v. Ayers*, 16 id. 392; *Mead v. Small*, 2 Greenl. 207; *Greely v. Hunt*, 21 Maine, 455; *Hunt v. Wadleigh*, 26 id. 271; *Orear v. McDonald*, 9 Gill, 350; *Armstrong v. Thruston*, 11 Md. 148, where insolvency was held to be no excuse for non-demand of the maker himself, and a demand on the assignee was held insufficient. See also *Benedict v. Caffé*, 5 Duer, 226. *Sed quære*. *Edwards v. Thayer*, 2 Bay, 217; *Bruce v. Lytle*, 13 Barb. 163, where a demand was made but five days after maturity, and the indorser was discharged.

*(q)* *Crossen v. Hutchinson*, 9 Mass. 205.

*(r)* *Sandford v. Dillaway*, 10 Mass. 52; *Farnum v. Fowle*, 12 id. 89; *Jervey v. Wilbur*, 1 Bailey, 453; *Allwood v. Haseldon*, 2 id. 457, where the same rule was applied to a note indorsed after maturity; *Hightower v. Ivy*, 2 Port. Ala. 308. *Contra*,



The reason is to be found in the stringency of the rule requiring demand, coupled with the fact that it is possible that the note may still be paid by the assistance of friends, or otherwise.

As between third parties, whether a presentment to the maker may not be dispensed with, has been treated as a distinct question from that of the necessity of presentment as against the maker or indorser of a note.<sup>(s)</sup> This question has arisen where a note is received in payment, both parties being ignorant of the insolvency of the maker; and the point is, whether the person who takes the note may not recover of the party from whom he receives it, without any presentment to the maker. For a consideration of this subject reference may be had to the chapter on Payment.<sup>(t)</sup> As neither death alone, nor insolvency alone, will excuse a want of demand, so the death of the maker leaving his estate insolvent will be insufficient.<sup>(u)</sup>

Insolvency also comes into consideration as an excuse, where it is connected with other circumstances. Thus, where the drawer had become bankrupt, and the acceptor unable to pay; the latter, in the presence of both holder and drawer, declared that he should not pay the bill when presented; a demand upon him at maturity was held to be still necessary in order to entitle the holder to prove the debt against the drawer's estate.<sup>(v)</sup> A similar question also arises where the maker becomes insolvent, and absconds; this point will be treated subsequently,<sup>(w)</sup> as

*De Berdt v. Atkinson*, 2 H. Bl. 336. This case will be further considered in the next chapter. In *Clark v. Minton*, cited 2 Const. R. 680, 682, the recorded insolvency of the maker at maturity was held an excuse for want of demand. This case is reported in 2 Brev. 185. See also *Kiddell v. Peronneau*, cited 2 Brev. 188.

<sup>(s)</sup> *Maule, J.*, *Sands v. Clarke*, 8 C. B. 751, 761.

<sup>(t)</sup> *Infra*, Vol. II. ch. 7. The cases on the subject of payment will be seen to be in a state of conflict, and the law on the point under consideration would probably depend upon the view entertained by the courts of any particular State on the general subject of payment.

<sup>(u)</sup> *Gower v. Moore*, 25 Maine, 16; *Lawrence v. Langley*, 14 N. H. 70, an action against the indorser of a joint note, one of the makers of which had died insolvent and the other had failed; *Johnson v. Harth*, 1 Bailey, 482. In *Davis v. Francisco*, 11 Misso. 572, where it appeared that the indorser, when he indorsed the note, which was done after maturity, knew the fact of the maker's death, a demand was held unnecessary, *Scott, J.* dissenting. The fact of knowledge, it is conceived, could hardly make any difference in the law.

<sup>(v)</sup> *Ex parte Bignold*, 2 Mont. & A. 633, 1 Deac. 712. How far declarations of the parties may affect the question of excuse will be considered *infra*.

<sup>(w)</sup> *Infra*, p. 449 *et seq.*

also the conduct necessary to be pursued by the holder where the note was indorsed for the accommodation of the maker, and the latter has failed.(x)

In case of a partnership note and a failure of the firm, it will still be necessary to present to one of the partners, or to use due diligence to find one; a demand at what was their place of business before failure, but not occupied by either of them at maturity, is insufficient.(y)

### 3. *Of other Circumstances.*

With regard to impossibility connected with the method of presentment, it has already been said that the party who makes the demand must have the note with him at the time; but if the note or bill is lost, it is obvious that this requirement cannot be complied with.(z) Yet this fact will not excuse want of presentment, as will be seen subsequently.(a)

With respect to the impossibility of presentment as to time, a question may arise where the holder receives a note so near maturity that it will be impossible for him to make a demand before that time. This will be connected with the point, as to what effect the distance of the place of residence or of business of the maker will have upon the subject of excuse, and will be considered in that connection.(b)

We have already seen that a neglect to present negotiable paper in which no particular time is mentioned for making the demand, is excused, if the holder, within the period at which he should have presented it, puts it into circulation.(c)

Where neither the maker nor his last and usual place of business or of residence can, by the exertion of due diligence, be found, the holder may, by showing these facts, hold an indorser liable.(d) Thus, where the maker of a note is a sailor, who has

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(x) *Infra*, p. 555.

(y) *Granite Bank v. Ayers*, 16 Pick. 392. See *infra*, note d.

(z) *Infra*, Vol. II. ch. 9.

(a) *Infra*, Vol. II. ch. 9.

(b) *Infra*, p. 456.

(c) *Supra*, p. 267.

(d) *Duncan v. M'Cullough*, 4 S. & R. 480; *Franklin v. Verbois*, 6 La. 727. In this case the notary certified, "that diligent inquiry was made at several places of public resort in this city and elsewhere for the drawer of the note, in order to demand payment, but he could not be found, nor any person who could tell where he was to be found." The

no established place of abode, and is at sea when the note matures, proof of these facts will constitute a sufficient excuse for non-presentment.<sup>(e)</sup> But if he has a place of residence where his family are living when the note matures, it will be necessary to present it there.<sup>(f)</sup>

Where the maker has absconded, according to many authorities, the holder is entitled to recover of an indorser, by simply proving this fact and due notice, without showing any further search.<sup>(g)</sup> But in a late case in Massachusetts it has been held

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defendant introduced testimony to show that the maker was living with his mother in the same city where the protest was made. The demand was held sufficient to charge the indorser. *Bullard, J.* said: "There is no evidence to show that the holder of the note, or the notary, knew the domicile of the maker; and we are of opinion that making diligent inquiry for the maker, and for his domicile, without effect, excuses the want of a formal demand." In *Stewart v. Eden*, 2 Caines, 121, the general principle seems to be taken for granted, though a demand was actually made on a clerk of the maker. In *Helme v. Middleton*, 14 La. Ann. 484, a firm on whom a draft had been drawn had dissolved prior to the maturity of the draft, leaving no place of business, nor could they be found when the draft matured. The drawer was held. We have already seen, that, where either of the partners could have been found, by the use of due diligence, the holder would have been bound to present the draft to him. *Supra*, p. 448, note *y*. See *Galpin v. Hard*, 3 McCord, 394.

<sup>(e)</sup> *Moore v. Coffield*, 1 Dev. 247; *Beardsley, J.*, *Taylor v. Snyder*, 3 Denio, 145, 151.

<sup>(f)</sup> *Whittier v. Graffam*, 3 Greenl. 82; *Dennie v. Walker*, 7 N. H. 199. See *Bellevre v. Bird*, 16 Mart. La. 186.

<sup>(g)</sup> In *Anonymous*, 1 Ld. Raym. 743, it is said that "The custom of merchants is, that if B. upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable may protest it, to have better security for the payment, and to give notice to the drawer of the absconding of B; and after time of payment is incurred, then it ought to be protested for non-payment the same day of payment or after it. But no protest for non-payment can be before the day that it is payable. Proved by merchants at Guildhall, Trin. 6 W. & M., before *Treby*, Chief Justice. And the plaintiff was nonsuit, because he had declared upon a custom to protest for non-payment before the day of payment." In *Putnam v. Sullivan*, 4 Mass. 45, *Parsons, C. J.* said: "The first objection made by the defendants is founded on a want of a demand of payment on the promisor when the note was payable. As to this objection, the facts are, that, on the first day of grace, which was the last day of February, notice was left at the lodgings of the promisor, that the note would be due on the last day of grace, with a request to pay it then; but it also appears that before that time it was known to the parties that he had absconded, and when the note was payable was not to be found. The condition on which an indorser of a note is holden is, that the indorsee shall present the note to the promisor when due, and demand payment of it, if it can be done by using due diligence. Now it appears that when the note in this case was due, it could not be presented to the promisor for payment, and that there was no neglect in the indorsees. We are all, therefore, satisfied that the indorsers are holden on their indorsement in this case, notwithstanding there was no demand on the promisor." In *Widgery v. Munroe*, 6 Mass. 449, the maker before the note fell due "stopped payment and went out of the country," and the court held that the plaintiff was excused

that, if the maker of a note absconds, leaving no visible property which can be attached, a want of demand or of inquiry for him is not thereby excused so as to charge an indorser, though the latter knew of such absconding.<sup>(h)</sup>

If the maker removes from the place in which he resided and transacted business to another jurisdiction between the time a note is made and its maturity, the holder will not be obliged to go out of his own State in order to make a demand either on the maker personally or at his new place of business or of residence.<sup>(i)</sup> Whether it will be necessary for the holder to use due

from demanding payment of him. In *Hale v. Burr*, 12 Mass. 89, *Parker*, C. J. said: "It is well settled, that, if the promisor abscond before the day of payment, or has concealed himself, the necessity of a demand is taken away. Due diligence to find him is all that is required in the latter case; and in the case of absconding, even that is not necessary." There are also *dicta* to the same effect in *Shaw v. Reed*, 12 Pick. 132; and in *Gilbert v. Dennis*, 3 Met. 495, 499, per *Shaw*, C. J. The point was decided in *Lehman v. Jones*, 1 Watts & S. 126; *Reid v. Morrison*, 2 id. 401. See *Duncan v. M'Cullough*, 4 S. & R. 480; *Wolfe v. Jewett*, 10 La. 383; *Galpin v. Hard*, 3 McCord, 394. In *Gillespie v. Hannahan*, 4 id. 503, *Johnson*, J. said: "It seems to be generally agreed, that the absconding of the maker of a note, or the acceptor of a bill of exchange, will excuse the holder from making a demand." See *Gist v. Lybrand*, 3 Ohio, 307. In *Taylor v. Snyder*, 3 Denio, 145, *Beardsley*, J. lays it down as undoubted law, that absconding is an excuse; and in *Spies v. Gilmore*, 1 Comst. 321, his remarks are cited with approbation by *Jewett*, C. J. See also *Bruce v. Lytle*, 13 Barb. 163.

(h) *Pierce v. Cate*, 12 Cush. 190, *Shaw*, C. J. said: "The court instructed the jury that, if the maker had absconded, leaving no visible property subject to attachment, no presentment of the note to the maker, or demand at his dwelling-house, or other inquiry for him, was necessary. . . . The court are of opinion that this direction is not sustained by the rules of law, and that it is incorrect. We are aware that in some of the earlier cases in Massachusetts it was held that proof that the maker had absconded, or failed, and become insolvent, so that a demand would be unavailing, would be an excuse for want of presentment. But it has been decided, on consideration, and upon principle, that the obligation of an indorser is conditional; that is, that he will be answerable if, at the maturity of the note, the holder will present it to the maker for payment; and if, thereupon, the maker shall neglect or refuse to pay it, and the holder will give seasonable notice to the indorser, he will pay it himself. These are the conditions of his liability. The holder, therefore, to charge the indorser, must show a compliance with these conditions, or that proper means have been taken to effect a compliance with them, unless indeed he can prove a waiver of them by the indorser. And this, we think, is the rule as now settled. If the maker has left the State, the holder must demand payment at his actual or last place of abode, or of business, within the State." It is not stated in the report, but it is a fact personally known to us, that this point was not argued, nor indeed raised, by counsel in this case. The defence was based upon other grounds, because it was supposed that the decisions overruled by this case, and the practice under them, had established the law.

(i) In *M'Gruder v. Bank of Washington*, 9 Wheat. 598, the maker removed from the District of Columbia to Maryland ten days before the note in suit matured, with-

diligence to find the maker's last and usual place of business or of residence in the place which he has left is unsettled, the authorities being conflicting.(j) But we consider that it is more in accordance with the rules of law respecting demand to require

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out the knowledge of the holder. The notary certified that he went to the place where the maker last resided in order to demand payment, but not finding him there, and being ignorant of his place of residence, returned the note under protest. Held sufficient to charge an indorser. *Wheeler v. Field*, 6 Met. 290, where the maker had left New York for Illinois; *Anderson v. Drake*, 14 Johns. 114, where the maker had removed from Albany to Canada, and a demand at the former place was held sufficient to charge an indorser; *Central Bank v. Allen*, 16 Maine, 41, where the maker had removed from Portland to the Western country, and a written demand at his former residence was held sufficient; *Reid v. Morrison*, 2 Watts & S. 401, where the maker had left Ireland and gone to America; *Gillespie v. Hannahan*, 4 McCord, 503, where the maker left Charleston, and was supposed to have gone to Philadelphia; *Galpin v. Hard*, 3 id. 394; *Gist v. Lybrand*, 3 Ohio, 307; *Widgery v. Munroe*, 6 Mass. 449; *Beardsley, J., Taylor v. Snyder*, 3 Denio, 145. See the cases cited *supra*, p. 449, note f.

(j) In *Wheeler v. Field*, 6 Met. 290, *Wilde, J.* said: "The second ground of exception is, that the demand should have been made at the maker's last place of residence in the city of New York, unless it could be clearly proved that the plaintiffs had made reasonable inquiries, unsuccessfully, to ascertain the same. And on this ground we are of opinion that the exception is well sustained. The general rule is, that to charge an indorser of a promissory note, a personal demand on the maker is to be made; or if he be not found where he ought to be found, and no place of payment is specified, a demand at his place of abode or place of business is sufficient. If he removes into a foreign country, or another State, a demand at his new place of residence is not required. . . . The demand should have been made at the maker's last place of residence in New York, and the plaintiffs were bound to make diligent inquiries to ascertain it. This we consider indispensable; and as the jury were not so instructed, but, on the contrary, were instructed that no demand, under the circumstances stated, was necessary, the defendant is entitled to a new trial, notwithstanding the finding of the jury that the notary had used due diligence in this respect." In *Galpin v. Hard*, 3 McCord, 394, the maker had removed, and it did not appear where he had gone. *Johnson, J.* said: "I take it, it is a settled rule, that when the maker of a promissory note has removed from the place where the note represents him to reside, and, for the same reason, where he did reside at the time the note was made, the holder is bound to use every reasonable endeavor to find out where he has removed, and if he succeed, present it for payment." But in *Gist v. Lybrand*, 3 Ohio, 307, the court say: "Whether a demand should be made at any other place is not made a point, or adjudicated upon, in that case (*M'Gruder v. Bank of Washington*, 9 Wheat. 598). But it seems to us a clear consequence of the decision, that such demand is unnecessary. The fact of removal commits the indorser, and dispenses with all demand, unless a particular place be appointed for the payment of the note in the note itself." It is not clear from the case itself but that the maker had absconded. If so, a different rule might apply. The declaration averred that diligent search had been made for the maker, but he could not be found; also, that he had secretly absconded. So, in *Reid v. Morrison*, 2 Watts & S. 201, *Sergeant, J.* said: "It was therefore impossible to make a presentment to the maker in Ireland, and it would seem the holder was not bound to search for him in a foreign country; but his removal dispensed with any further effort, and made the indorser, *ipso facto*, liable

that the holder should endeavor to find this last place of business or of abode, and present the note there. Our reason for this is, that it is no unfair or unreasonable presumption that the maker left, at his place of business within the State, means and arrangements for attending to the business which he began there and left unfinished there. The different States of this country are considered as foreign to each other in this respect.(k)

An opinion seems to have been intimated that the contiguity of the old and new places of residence would have some effect on the question of excuse, as relating to this point; thus, if the maker acquires a new domicile in a town adjoining his former place of residence, but in a different State, that the rule respecting due diligence would require a demand at the latter place.(l) But this view cannot be sustained, we think, without producing confusion and obscurity in the law, where precision and certainty are of more importance than abstract justice.(m) When the

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without it." In this case the maker had absconded. In *Gillespie v. Hannahan*, 4 McCord, 503, diligent inquiry was made for the maker, and it was ascertained that he had no place of residence in the city in which he made the note. The judge, at Nisi Prius, held this to be insufficient; but his ruling was reversed. The point now under consideration does not seem to have been dwelt upon. In *Dennie v. Walker*, 7 N. H. 199, the rule is stated by *Upham, J.*, as follows: "A removal without the bounds of the government, after the making of a note and before it becomes due, and where no place of payment of the note is specified, renders a demand upon the maker unnecessary; but this is an exception to the general rule, and must be construed strictly. Anything less than an actual change of residence, by removal without the State, would leave the rule too uncertain. In case of mere absence from one's place of residence, it is immaterial whether it is for a longer or a shorter period. If the maker has a known domicile or place of business within the State, a demand of payment at such place is essential in order to charge the indorser."

(k) *Gillespie v. Hannahan*, 4 McCord, 503 See the cases cited *supra*, p. 451, note j

(l) *Wilde, J.*, *Wheeler v. Field*, 6 Met. 290.

(m) In *Gillespie v. Hannahan*, 4 McCord, 503, *Johnson, J.* said, in substance: In the case of *Widgery v. Munroe*, 6 Mass. 449, the court say, that if, on the day when the note became due, the maker being then out of the country, the plaintiff was excused from demanding payment of him, and it might seem unreasonable that, when he had only removed across an imaginary line separating two countries, that it should be dispensed with. But it is equally unreasonable that the holder should be compelled to follow him to St. Petersburg. The necessity of a certain rule leaves no alternative but the adoption of one or the other of these extremes. There can be no compromise between them that will not work injustice. So in *M'Gruder v. Bank of Washington*, 9 Wheat. 598, where the new place of residence was but nine miles from the old one; and yet it was held that the holder was not obliged to present the note at the latter place. *Johnson, J.* said: "We think that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from an actual demand. Precision and certainty are often of more importance to the rules of law than their



removal is simply to another place within the same jurisdiction, due diligence must be used to find the maker at the place to which he has removed.<sup>(n)</sup>

We have already alluded to the circumstance of the note being dated at a particular place, and the presumption to be drawn therefrom. We should add, that neither this fact nor any other excuses the want of *due* diligence; it only raises the question, What is in that case due diligence? And we incline to think the answer should be, that this date does not excuse a holder from demanding payment of the maker elsewhere, if within the State, and the holder knows, or ought to know, where he is; but that a holder is not bound to make more inquiry than within that town, unless there be something which tells him that by going elsewhere within the State he will find him.

Where the maker, at the time of signing the note, lives in another State from the one in which the note is dated and delivered, and in which the holder lives, a different question is presented. Where the party who receives a note under such circumstances knows, when he takes it, where the maker lives, and

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abstract justice. On this point there is no other rule, that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding, or removal out of the kingdom, the indorser is held in England to stand committed; and although from the contiguity and, in some instances, reduced size of the States, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the seaboard to the frontier States, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British Channel."

(n) *Anderson v. Drake*, 14 Johns. 114, where the maker had removed from New York to Kingston, both places being in the State of New York, *Thompson, C. J.* said: "I am inclined to think that where a note is not made payable at any particular place, and the maker has a known and permanent residence within the State, the holder is bound to make a demand at such residence, in order to charge the indorser. Whoever takes such note is presumed to have made inquiry for the residence of the maker, in order to know where to demand payment, and to assume upon himself all the inconvenience of making such demand, and the risk of the maker's removing to any other place before the note falls due. As the demurrer, therefore, in this case admits the permanent residence of the maker to have been at Kingston when the note fell due, and that known to the plaintiff, he was bound to demand payment of the note at that place; and not having done so, the indorser is discharged." *La. Ins. Co. v. Shamburgh*, 14 Mart. La. 511, where the maker had removed from New Orleans to Plaquemine; *Bellievre v. Bird*, 16 id. 186. See *Gillespie v. Hannahan*, 4 McCord, 503; *Wilde, J., Wheeler v. Field*, 6 Met. 290; *Sergeant, J., Reid v. Morrison*, 2 Watts & S. 401.



has sufficient time before the maturity of the note within which to cause a proper demand to be made upon the maker, it would seem to follow that he should be considered as taking the risk of a proper presentment in the State where the promisor resides. We think also that it follows from the general principles relating to the contract of indorsement, that due diligence would require a demand at the place in which the maker lives.(o)

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(o) *Taylor v. Snyder*, 3 Denio, 145. The facts of the case were, that the promisor, a resident of Florida, made and dated the note in Troy, N. Y. The holder knew this fact as early as a month or two before the note matured. The indorser also knew it at the time of indorsement, but no stress is laid upon this circumstance. The demand was made on the indorser at Troy, and it was held insufficient. *Beardsley, J.*, in a very able and elaborate decision, after stating that the fact that the note was dated at Troy did not make it payable there; and reviewing the cases and law on the subject of excuse, saying that the excuses were exceptions to the general rule, which must be construed strictly, continued: "We are, then, to inquire whether these exceptions are to be multiplied, and extended to a case where no change in the condition of either party has taken place, where the maker, when the note was made and indorsed, had a known residence in another State, and which had remained unchanged at the maturity of the note. It is palpable that this exception, if made, must be placed on some new principle; it cannot be allowed on the ground which upholds the others. The facts in this case are unchanged, and as the reason for making an exception does not exist, the exception itself should not be allowed. Unless, therefore, the general position is true, that one who indorses for a maker who lives in another State may be held liable without any demand being made on the maker, I think the defendant was not liable in the case at bar. And if any such general rule of law as I have stated exists, it certainly may be shown; but that it has no existence is, as I believe, not only according to the universal understanding amongst commercial men, but also according to the settled course of business in the commercial world. The indorsement of a note is an order to the maker to pay the amount to the indorsee or holder, as is specified and agreed in the note, and an engagement by the indorser, that if the note is duly demanded of the maker, and not paid, or if it shall be found impracticable to make a demand, the indorser will himself, on receiving due notice, pay the amount to the indorsee or holder. Now, where such an order is drawn upon a maker who resides in another State, and which is well known to the person in whose favor the order is drawn, upon what principle can it be said that a demand of the maker is unnecessary? The indorsee voluntarily consents to take such an order, and why should he not perform the condition on which the ultimate liability of the indorser depends? I confess I see no reason why he should not. Here is no mistake, or misapprehension of fact, at the time the indorsement is made. The indorsee knows where the maker resides, and that it is in another State. He knows that, by law, unless the intervention of a State line makes a difference, the maker must be sought where he resides, and the demand must be made there. When the time for payment arrives, the maker is still at his former residence; the facts of the case are precisely as they were when the order was drawn. Why, in such case, should the State line make a difference in the construction and legal effect of this contract of the indorser? It was fairly entered into between the parties; let it then be fairly observed and performed by them. I can well understand why such an order, made by an indorser upon the maker of a note, *then residing within this State*, but

But it will be seen from the authorities cited in the note, that this view is not universally adopted. (*p*)

The same doctrine has been held where the promisor lived in

who removes into another State before the note falls due, should receive a different construction, and that it would be unreasonable to require the holder to follow the maker to his new residence, in order to demand payment. Here a new and unlooked-for event has occurred, which, like the absconding of a maker, or an inability to discover his residence, may very reasonably be held to excuse a demand. In these respects, the indorser should be held to stand committed by the act of the maker. But where the facts in reference to which the parties contracted were fully known to them, and are in no respect changed, I am unable to discover any principle which will excuse the maker from making a demand, or using proper diligence to make a demand, as in ordinary cases. The intervention of a State line has, in my opinion, no possible bearing on the question." *Bank of Orleans v. Whittemore*, Superior Ct. Mass., 20 Law Rep. 333, where the note was made and dated at Boston, and the maker resided in Newbern, N. C. This case was affirmed in the Supreme Court, 12 Gray. *Burrows v. Hannegan*, 1 McLean, 309. In this case, the maker lived in Newport, Indiana, and the note was made and dated at Cincinnati. A demand at the latter place was held insufficient. It will be observed that nothing is here said about the knowledge of the maker's residence by the holder. In *Smith v. Philbrick*, 12 Gray, the maker, two years before the note, which was payable at three months, was made, removed from Boston, where he had lived and transacted business, to Port Lavacca, Texas, where he resided and conducted his business when the note matured. The note was made and dated at Boston, between which place and Port Lavacca the mail passed in twelve days. The notary certified that he went with the note to the maker's place of business in Boston, and finding no one there to pay the note, protested the same. Held, that a personal demand at Port Lavacca was not necessary, unless the holder proved affirmatively that the holder of the note, at the time it became due, knew of the maker's residence; that all that was required was the exercise of due diligence to make a demand in Boston, and that such had been used in this case. *Sed quære*. See *infra*, p. 459, note c.

(*p*) In Story on Prom. Notes, § 236, it is said: "It seems also that, if the maker of a promissory note resides and has his domicil in one State, and actually dates, and makes, and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there." The authority which the learned author cites is *Hepburn v. Toledano*, 10 Mart. La. 643. It is not clear from the case whether the maker lived in a different State from the one in which the holder resided, or removed after making the note. Nor does it appear that the indorsee knew where the maker lived. *Porter, J.* said: "The statement of facts shows that the note was dated in New Orleans, but not made payable there, and that the drawer resided in Kentucky at the time of the protest, and does so now. The only question which this case presents is, whether the holder of the note was obliged to go out of the State to demand payment. There is some difficulty as to the place where demand is to be made, when the maker of a note or acceptor of a bill has been a resident of the State, and before the time of payment has changed his domicil; but if he lives in another country, the indorsees cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at that place where the note is drawn." It will be seen that the learned judge cites, as an authority, the case of *Anderson v. Drake*, 14 Jolins. 114, *supra*, p.

a different country from that in which the holder resided at the time the note was indorsed to him.(q)

It seems now to be well settled that mere distance is no excuse for non-presentment,(r) although there are opinions to be found in some of the earlier reports to the effect that the holder may wait, on the day the note falls due, for the maker to come and pay; and if the note is dishonored, that a reasonable time will be given within which to cause a proper demand to be made.(s)

But distance may have some effect in another point of view. Thus, where an indorser transfers a note to the holder so soon before maturity that the former must know the impossibility of the demand being made at the very day the note falls due, we think that this indorser, with reference to his immediate indorsee, would be considered as having waived his strict right to require a demand at maturity.(t) But this cannot apply to the prior

453, note n, which is a case of removal to another country. In *M'Gruder v. Bank of Washington*, 9 Wheat. 598, *Johnson, J.* said: "In case of original residence in a State different from that of the indorser at the time of taking the paper, there can be no doubt." He then goes on to state, that the question of removal to another State prior to maturity is a difficult one, and to decide that a demand at the latter place is unnecessary. It is not easy to see which view the judge adopted.

(q) *Spies v. Gilmore*, 1 Comst. 321, 1 Barb. 158, where this is considered as a legitimate conclusion from the doctrine laid down in *Taylor v. Snyder*, 3 Denio, 145, *supra*, p. 454, note o, *Gardiner, J.* dissenting, on the ground that "Expediency and public convenience require that the necessity of a personal demand should be confined to cases where the maker resides within the States or Territories of the Union. It is difficult to prescribe any other rule which will not leave too much latitude as to place and distance, and of course be fluctuating where it should be certain. Instances will readily occur to every one in which making a demand in a foreign country would be attended with little inconvenience, and others in which it would be impracticable. Between these extremes there is a wide interval which would be opened to litigation, which sound policy requires to be closed."

(r) *Johnson, J.*, *M'Gruder v. Bank of Washington*, 9 Wheat. 598, 601, note; *Bank of Orleans v. Whittemore*, *supra*, p. 455, note o. See also the cases cited *supra*, pp. 450 - 455.

(s) *Haddock v. Murray*, 1 N. H. 140. See *Freeman v. Boynton*, 7 Mass. 483; *Parker, C. J.*, *Barker v. Parker*, 6 Pick. 80.

(t) *Abbott, J.*, *Bank of Orleans v. Whittemore*, 20 Law Rep. 333; Story on Prom. Notes, § 265. But in Chitty on Bills, 10th Lond. ed., p. 266, it is said: "The circumstance of the holder having received a bill very near the time of its becoming due, is no excuse for neglect to present it for payment at maturity; for he might renounce it if he did not choose to undertake that duty, and send the bill back to the party from whom he received it; but if he keep it, he is bound to use reasonable diligence in presenting it." We think that this should be qualified according to the statement in the text. It will be observed, that in the case put the indorser himself has lost his remedy against any prior indorser, unless under similar circumstances; and the effect of the indorsement would probably be the same as if the note were indorsed after maturity.

indorsers, who transferred the note long enough before it fell due to have a proper presentment made.(u) The same question would occur where a joint note is indorsed, the indorser knowing that the makers lived so far apart that a demand on both could not be made on the same day. Here also we think that if the holder presents the note to one when it falls due, and to the others as soon as he reasonably can, he has done all that due diligence can require, and would not lose his claim on the indorser.(v)

What will constitute due diligence to find the maker cannot be prescribed by any fixed rule to which all circumstances must bend, as each case depends necessarily, in a great degree, upon its own peculiar facts. It has been held, that if the holder goes with a bill within reasonable hours to the house to which it is directed, and finds the door closed, he is entitled to protest it without any further inquiries for the drawer or acceptor ;(w) and the same seems to have been held with reference to the maker of a note in which no place of payment is specified.(x) But we think that some inquiry should still be made for the payor ; or at least that this is the safer as well as the better way.(y)

(u) Story on Prom. Notes, § 265.

(v) *Abbot, J., Bank of Orleans v. Whittemore*, 20 Law Rep. 333.

(w) *Hine v. Allicy*, 4 B. & Ad. 624. But in this case, as reported 1 Nev. & M. 433, it would seem that some inquiry was made for the acceptor. See *Buxton v. Jones*, 1 Man. & G. 83, 1 Scott, N. R. 19. In *Ogden v. Cowley*, 2 Johns. 274, some inquiry was made.

(x) *Shed v. Brett*, 1 Pick. 413. In this case the notary testified that he made diligent search for the promisors, but could not find either of them. *Parker, C. J.* said : " And the question is, whether going to their place of business, finding it shut, no person being left there to answer any inquiries, is due diligence. We put out of the case the declaration of the witness, that he made diligent inquiry, because it does not appear where or of whom he inquired ; and as the promisors both lived in Boston, if inquiry was necessary, it would hardly seem that enough was made. It seems, however, by the authorities, that what was done was sufficient, provided the witness went to the place of business of the makers, in business hours, which is not stated in his testimony. And if, upon further application to the notary, he is not able to state this fact, a new trial may be had, or the plaintiff ought to become nonsuit. But supposing this to be with the plaintiff, he is entitled to recover." If the holder had done all that due diligence required, then the fact that the makers had removed would seem to be immaterial. But the law is, that where the maker has removed to another place in the same State, a demand at the last place, or inquiries to find it, are indispensable. It is difficult to reconcile this case with the general rules of law concerning demand, and we doubt the decision.

(y) In *Collins v. Butler*, 2 Stra. 1087, one of the questions was, whether the plaintiff had shown sufficient by proving that the maker shut up the house and went away

The case may, perhaps, be different where a note or bill is payable at a particular place, and the party sought to be charged has a right to require a demand at the place, (z) because a demand anywhere else would be unavailing, and one at a place with closed doors might be considered as only a useless ceremony.

It has been sometimes said, that using due diligence to find the maker at the place where a note is dated will satisfy the requirements of the law upon the subject of demand; (a) but if this were a universal rule, it would, in effect, make a note payable at a city or town merely because dated there, which is contrary to the weight of authority, (b) and we prefer the view we have already given.

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a month before the note matured. "And in this particular case *Lee*, C. J. held that the plaintiff had not gone far enough, but ought to show that he had inquired after the drawer, or attempted to find him out." If the mere fact that the house is shut up is sufficient, there would seem to be no necessity for the holder to go there at all; and unless this is necessary, the case just cited is in conflict with *Shed v. Brett*, 1 Pick. 401, *supra*, p. 457, note x. In *Ellis v. Commercial Bank*, 7 How. Miss. 294, 303, *Clayton*, J. said: "In nearly all the cases which we have been able to find on this point, after a very diligent search, the evidence shows that inquiry was made in the neighborhood for the maker, or acceptor, when he was not found at his dwelling or place of business, and thus an excuse for want of personal demand is furnished." The court, however, refrained from deciding the point, because it was not necessary to the case.

(z) In *Howe v. Bowes*, 16 East, 112, the declaration averred that the defendant, a maker of a note payable at the Workington Bank, became insolvent, and wholly declined and refused to pay at that place. The evidence was, that the Workington Bank was closed, and no payment had been made there for some time before the suit. The plaintiff obtained a verdict, and the court refused to grant a new trial. Lord *Ellenborough*, C. J. said: "As it is not disputed that the banking-house was shut up, and that any demand of payment which could have been made there would have been wholly inaudible, that is substantially a refusal to pay their notes to all the world." This judgment was reversed in the Exchequer Chamber, 5 Taunt. 30, on the ground that the allegation itself was insufficient.

(a) *Bay*, J., *Moodie v. Morrall*, 3 Const. R. 367, said: "Charleston, being the place where the note was drawn and indorsed, shall be presumed to be the residence of both for every mercantile purpose, and the use of due diligence to find out either of them there will answer the demands of the law upon this subject. It would be a monstrous inconvenience and embarrassment to commerce, if the holder of a bill or note was obliged to travel all over the world to find out the maker or indorser, in order to give him notice of the non-payment. I take it, therefore, to be a well-established rule of mercantile law at this day, that the use of due diligence, in the place or city where the bill is drawn, to find out either maker or indorser, is all that is requisite." In the case itself, however, a demand was made at the house of the maker, on his wife, who informed the notary that the former was out of town; and this was held sufficient. See *Hepburn v. Toledano*, 10 Mart. La. 643.

(b) *Supra*, p. 441, note x. See also the remarks of *Johnson*, J., cited *supra*, p. 451, note j; of *Thompson*, C. J., p. 453, note n.

It may be said that a person who takes a note is under some obligation, at the time he receives it, to know or to inquire where the maker lives; and if so, and he neglects to do this, refraining from all inquiry, he should suffer the consequences of not being able to make a regular demand. It must certainly be true that the holder cannot alter the terms or the essential principles of the contract of indorsement, and they would require of him at least as much as ordinary foresight and prudence would seem to require.<sup>(c)</sup> It has been held that due diligence makes necessary an inquiry of the indorsers or other parties to the note for the place where the maker may be found, and because such inquiry was not made, the indorsers were discharged.<sup>(d)</sup> The

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(c) We have already stated our opinion to be, that where the holder knows when he takes the note that the maker lives in another jurisdiction, and there is sufficient time before maturity to make a demand on the maker, such a demand is necessary. The same rule should apply, we think, even if there be no knowledge of such residence, provided there were sufficient time given to make the inquiries, and afterwards a demand. For this reason we should doubt the authority of *Smith v. Philbrick*, *supra*, p. 455, note *o*.

(d) In *Porter v. Judson*, 1 Gray, 175, the certificate recited that the notary went "to various places, making diligent inquiry of divers persons for the promisor, but could not find him, nor any one knowing him, nor any one with funds for the payment of the note." When the note became due, the maker was living in the same city with the indorser; but prior to giving the note he had resided elsewhere. *Shaw*, C. J. said: "The presumption is strong, not to say violent, that his home and place of business were known to the indorsers, the last of whom indorsed the note to the plaintiffs, for value. . . . From this statement, it appears that the notary knew the places of business of the indorsers, but it does not appear that he inquired of them, and the probability is that he did not, because if he had, the presumption is that he would have found the promisor." In *Wheeler v. Field*, 6 Met. 290, the notary took the note to the office of the third indorser, to inquire for the maker and the other indorsers, but was told that the third indorser was out, and also that a person living near by could give the desired information. This person, on being asked, did not know where the parties lived. The notary then protested the note. It was held that the third indorser was discharged. *Wilde*, J. said: "It cannot be doubted, that, if inquiries had been made of the payee or the other indorsers, the maker's place of residence might have been ascertained." In *Duncan v. M'Cullough*, 4 S. & R. 480, it was held that an indorser was not obliged to tell the holder where the maker was to be found. In *Packard v. Lyon*, 5 Duer, 82, a note had been deposited in a bank for collection. The notary inquired of the bank where the maker lived, and none of the officers could tell him. The directory was consulted, but the name could not be found there. The notary then made a formal demand at the bank, and on refusal to pay, protested the note. Held, that due diligence had not been used. *Slosson*, J. said: "It may be exceedingly inconvenient, at times, to find the place of residence of the maker of a note; but that forms no excuse for the want of the knowledge, if it can be obtained. It was gross carelessness in the holder to send the note to the bank for collection, without a memorandum indorsed on it, or accompanying it, to



reason given is, that, from the circumstances of the case itself, there was a presumption that the indorser knew where the maker was, and could give the requisite information; where this reason exists, there can be doubt of the rule; but we are not prepared to say that the law would always presume this reason and necessity from the relation of the parties.

Want of presentment at maturity is excused by any inevitable or unavoidable accident, not attributable to the fault of the holder; for this would bring it within the rule which excuses a demand whenever it is morally or physically impossible.(e)

Among the circumstances recognized by Mr. Justice Story as constituting an excuse are the following: The prevalence of a malignant disease which suspends the ordinary operations of business, and which would make it dangerous to enter the infected district.(f) The presence of political circumstances amounting to a virtual interruption and obstruction of the ordinary negotiations of trade.(g) The breaking out of war between the country of the maker and that of the holder.(h) The occupation of the country where the parties live, or where the note is

show where the maker was to be found. This was a duty which he owed both to the bank and its notary; and he is without excuse in throwing upon the latter officer the trouble, annoyance, and possible risk of finding out a fact for his benefit with which he is presumed to be himself acquainted, and with which he ought to be acquainted in fact." As to the necessity of consulting a directory, see *Granite Bank v. Ayers*, 16 Pick. 392.

(e) *Storrs, J.*, *Windham Bank v. Norton*, 22 Conn. 213; Lord *Ellenborough*, *Patience v. Townley*, 2 J. P. Smith, 223; *Savage, C. J.*, *Schofield v. Bayard*, 3 Wend. 488.

(f) Story on Prom. Notes, §§ 257, 260. See *infra*, chapter on Notice. In New York, by statute, R. S. 1852, Vol. II. p. 178, it is enacted, that, whenever the board of health of the city of New York, or any other competent authority, shall, by public notice, designate any portion of that city as the seat of an infectious and contagious disease, and declare communication with such district dangerous, it shall be the duty of the clerk of the city and county to provide a book in which the names, firms, and places of business of any inhabitant of the city shall be registered, if the parties desire it. The parties are required to designate a place, in the registry, outside the infected district, but within the county of New York, for the purpose of having a demand of notes, drafts, or bills made, and to which notice may be sent. Any demand made at, or notice sent to, such place is declared valid. In case of neglect to make the registry, the holder may present the note, bill, or draft to the city clerk, and on dishonor, deposit a notice in the post-office directed to the proper parties, if they live within the infected district.

(g) Story on Prom. Notes, §§ 257, 261. *Patience v. Townley*, 2 J. P. Smith, 223; *Kufh v. Weston*, 3 Esp. 54. See *Hopkirk v. Page*, 2 Brock. 20.

(h) Story on Prom. Notes, §§ 257, 262.



payable, by a public enemy, which suspends commercial intercourse.(i) Public and positive interdictions and prohibitions of the State which obstruct or suspend commerce and intercourse.(j) But it is also said that a violent storm will not excuse non-presentment at maturity, though a violent tempest which has so broken up the roads or obstructed them as to prevent passing might have this effect.(k) We should prefer to say, as to all these excuses, that no one of them necessarily and always, by an absolute presumption of the law, is sufficient (unless, perhaps, the case of war be excepted), but only raises a *prima facie* presumption, more or less strong according to circumstances, and constituting an excuse, not in *law*, but in *fact*, if it comes within the meaning and scope of the rule of impossibility. Ordinarily any failure to present a note at the proper time, by reason of the negligence of an agent, would discharge an indorser,(l) but where the holder makes use of the public mail for the purpose of transmitting the note to the proper place in season to have a legal demand made, and without any negligence on his part, we should say that he would not lose his remedy on an indorser,(m) if

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(i) Story on Prom. Notes, §§ 257, 263.

(j) Story on Prom. Notes, §§ 257, 263.

(k) *Barker v. Parker*, 6 Pick. 80.

(l) *Storrs, J., Windham Bank v. Norton*, 22 Conn. 213, 219.

(m) *Windham Bank v. Norton*, 22 Conn. 213. *Storrs, J.* said: "No fault or impropriety is imputable to the plaintiffs, by reason of their having selected the public mail as the mode of forwarding the draft in question to the bank in Philadelphia, where it was payable. It is properly conceded by the defendants, that such mode of transmission was in accordance with the general commercial usage and law, in the case of paper of this description. Indeed, it is recommended in the books as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance. But although the public mail was a legal and proper mode by which to forward this paper, it was their duty to use it in such a manner that they should not be chargeable with negligence or unreasonable delay. If, therefore, they put the draft into the post-office at so late a period that, by the ordinary course of the mail, it could not, or there was reasonable ground to believe that it would not, reach the place of its destination in season for its presentment, when due, we have no doubt that there would be, on their part, a want of reasonable diligence, which would exonerate the indorser. On the other hand, to throw the risk of every possible accident, in that mode of forwarding the draft, upon the holder, where there has been no such delay, would clearly be most inconvenient, unreasonable, and unjust, as well as contrary to the expectation and understanding of the indorser, who is presumed to be aware of the general usage and law, in regard to the transmission by mail of this kind of paper, and must therefore be supposed to require only reasonable diligence in this respect on the part of the holder; and would indeed be inconsistent with the rule itself, which sanctions its transmission

through any accident or disorder, or the negligence or mistake of the post-office clerks, the note does not reach the destined place in season to make the demand on the very day

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in that manner. It has been suggested that the principle should be adopted, that when the holder resorts to the public mail, he should be required to forward the presentment at so early a period that if, by any accident, it should not reach the place of its presentment in the regular course of the mail, there should be time to recall it, and have it presented when and where it falls due ; or that, at least, it should be forwarded in season to ascertain whether it reached there by that time, and to make such a demand or presentment for payment as is required in the case of lost bills. We find no authority whatever for any such rule, nor would it in our opinion comport with the principle, now well established, requiring only reasonable diligence on the part of the holder, or with the policy which prevails in regard to such commercial instruments. It would, in the first place, be the means of restraining the transfer of such paper within such a limited time as to impair, if not to destroy, its usefulness and value, arising out of its negotiable quality ; and, in the next place, it would in many cases be wholly impracticable. The casualties incident to this mode of transmission are most various in their character, and cannot of course be foreseen ; and they might, in the case of forwarding mercantile paper, be such as to render it impossible to ascertain its miscarriage, or to recall it in season to remedy the difficulty. In the case of the draft now before us, for example, if it had been placed by the plaintiffs in the post-office at Windham, where they were located and transacted their business, for transmission direct from thence to Philadelphia on the very day when they became the holders of it, which was between three and four months before it became due, and by an accident or mistake of the postmaster in the former place, similar to that which occurred in this case at New York, it had been mailed to one of the most distant parts of our country, or to a foreign country, which would not have been more singular than that it should have been mistakenly mailed, as in the present case, for Washington, it might not have been practicable for the plaintiffs to learn the accident or obviate its effect before the paper fell due. In short, such a rule as that suggested would be merely artificial in its character, productive of great inconvenience and injustice in particular cases, without any corresponding general benefits, and change the whole course of business in regard to a most extensive and important class of mercantile transactions. Nor has any other arbitrary or positive rule been suggested which is not equally obnoxious to the same or similar objections. The only remaining inquiry is, whether the plaintiffs are chargeable with negligence for not forwarding the draft in question by an earlier mail from New York to Philadelphia. It was sent by the usual legal and proper mode. It was deposited in the post-office in season to reach the place where it was payable before it fell due, by the regular course of the next mail ; and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place when it should have done, but was carried beyond it in consequence of that mistake. As that mistake could not be foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed, they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the package, until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination was, therefore, so far as the

of maturity. But all the authorities do not seem to adopt this view.<sup>(n)</sup>

#### 4. *Of the Acts of a Party which affect his Right to require Demand of Payment.*

The second class of excuses, which we will now consider, arise from the acts, words, or position of a party, by means of which he is not entitled to the demand, of the want of which he would avail himself. If the drawer of a bill had no effects in the hands of the drawee, and had no legitimate expectations, grounded upon some definite arrangement, that the bill would be paid, we have seen that he has no right to require a demand of it.<sup>(o)</sup>

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plaintiffs were concerned, an unavoidable accident. It happened, not in consequence of any delay of the plaintiffs in putting the draft into the post-office at so late a period that it could not, or probably would not, reach its destination in due season, but merely in consequence of the act of the official to whom it was properly confided, done after it was properly in his charge by the plaintiffs for transmission. The accident, moreover, was of a very peculiar and extraordinary character, and quite different from those which are ordinarily incident to that mode of transmission, and against which it would be extremely difficult, if not impossible, to guard. It would have been equally liable to occur at any time, when the draft should have been placed in the post-office. It was not owing in any sense to the fault of the plaintiffs, but solely to that of the postmaster. Under these circumstances, we do not feel authorized to impute any blame or negligence to the plaintiffs. We are therefore of opinion that judgment should be rendered for the plaintiffs."

<sup>(n)</sup> In *Schofield v. Bayard*, 3 Wend. 488, the holder of a bill payable in London sent it by mistake to Liverpool. His agent at the latter place immediately sent it back to the holder; but by some oversight of the clerks in the post-office, it did not get to the holder in time for him to forward it to London, although had it not been for the detention, there would have been sufficient time to have had a regular demand made. *Savage*, C. J. said: "This case presents no impossibility, if due diligence had been used. The plaintiffs should not have sent the bill to Liverpool at all. It is true that, after the letter containing it had been left at Liverpool, it could not have reached London in season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool, they should have sent it to London, and then it would have been in season, and probably would have been paid. I am of opinion that, by the law merchant, payment should have been demanded in London on the 12th of November, and that not having been done, and there being no impossibility to prevent it but what is attributable to the want of due diligence on the part of the holder, the defendants are legally discharged, and are entitled to judgment." This case presents a somewhat different statement of facts from that in *Windham Bank v. Norton*, 22 Conn. 213, *supra*, p. 461, note *m*, and may perhaps be reconciled with it, on the ground that the failure to present was connected, in its inception, with a mistake of the plaintiffs themselves.

<sup>(o)</sup> *Terry v. Parker*, 6 A. & E. 502, 1 Nev. & P. 752. Lord *Denman*, C. J. said: "Many cases establish the fact that notice of dishonor need not be given to the drawer in such a case; and the reason assigned is, because he is in no respect prejudiced by

But the parties subsequent to the drawer have still that right, and are discharged by non-demand, although he is not.(p)

The reason why the drawer has no such right is twofold. In the first place, he had no right to draw and put into circulation such a bill; and, secondly, he can have no action or claim against the acceptor, for whom he is a surety, for not paying, because the acceptor was under no obligation to pay, and can suffer no injury which does not spring from his own fault. The test must always be in such a case, not whether the drawer had funds in the hands of the drawee, nor what particular arrangement he had made, but whether, in case of non-acceptance or non-payment, he can maintain an action against the drawee.

As by far the greater number of cases on this subject and its rules and their qualifications have arisen with respect to excuse for want of due notice, it has been thought best to postpone a further discussion of the topic until we treat of Notice. We shall also consider under that head the question as to what effect the making or indorsing a note for the accommodation of any party thereto has on the subject of excuse.

It is obvious that any one may waive his right to presentment and demand. This is sometimes done expressly, by an indorser writing over his name, "I waive demand," or other similar words.(q) There may be also a constructive waiver arising, by implication, from the acts or words of any particular indorser. This subject of waiver of demand is also so intimately connected with waiver of notice, that we prefer to consider them both together in the chapter on Notice.(r)

If an indorser belongs to two firms, one of which has signed and the other indorsed the paper, it has been held that a demand is still necessary.(s)

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want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since if the bill were presented, and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment and payment." *Dollfus v. Frosch*, 1 Denio, 367; *Commercial Bank v. Hughes*, 17 Wend. 94; *Aborn v. Bosworth*, 1 R. I. 401; *Tarver v. Nance*, 5 Ala. 712; *Foard v. Womack*, 2 id. 368. This subject will be further considered under Notice, *infra*.

(p) *Infra*, chapter on Notice.

(q) *Woodman v. Thurston*, 8 Cush. 157.

(r) *Infra*, chapter on Notice.

(s) *Dwight v. Scovil*, 2 Conn. 654. *Swift, C. J.* said: "The circumstance that one

With respect to the pleading in case of excuse, it will be seen that an averment of presentment and demand of payment on a promisor is supported by proof of circumstances amounting to an excuse thereof.<sup>(1)</sup>

We are unwilling to close this topic of excuse for non-presentment without remarking, that the rule requiring presentment is so stringent, and rests upon reasons which require so rigid an adherence to the rule, that it is not safe or prudent to rely upon any of these excuses, except, perhaps, an express waiver in writing on the paper itself.

A question might be raised in regard to the operation of a waiver beyond the person who makes it. If a payee indorses a note, and writes over his name, "I waive demand," he certainly cannot complain if no demand is made. But are all subsequent indorsers affected and bound by his waiver? So, if there be many indorsers, and the fourth indorser makes an express waiver of demand, the three before him are certainly unaffected by this waiver; but are those who follow equally unaffected? It might be said, that whoever indorses after a written waiver is made must be considered as assenting thereto, if he expresses no dissent. But, in the absence of authoritative decisions, we should say, on the general theory of waiver, that it cannot affect the rights of any person other than the party who makes it.

It should also be said, that although the whole law of negotiable paper rests upon the fact that such paper is intended to be an instrument of mercantile business, and is adapted to this purpose by this system of law, it is certain that the rules are the same, and equally enforced, whether the parties affected by them are merchants or not.

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of the defendants was a member of both the companies who made and indorsed the note can make no difference; for each company is to be considered as distinct persons, with different funds and liabilities, and there is the same reason for presentment and demand as if the companies were wholly different. If the companies should reside in different and distant places, the drawing of bills on each other might be convenient in the course of their business; but, on the principle contended for, the company drawing the bill might be subjected to pay it, because one of the partners belonged to both companies when the company on whom it was drawn was solvent, and would have paid the bill if it had been presented."

(1) *Infra*, chapter on Pleading.

## CHAPTER XII.

## OF NOTICE OF DISHONOR.

WHILE the duties of presentment and of notice of dishonor are distinct, they are so far similar that much that was said of presentment, as to the persons by whom and to whom, the form and manner, and excuses for the non-performance of the duty, are applicable to both topics, yet there are important differences between them; and it seems better to treat of both topics independently, even at the risk of some actual and more apparent repetition.

We shall examine, first, the form of the notice; secondly, the manner in which it should be given; thirdly, the place to which it should be sent; fourthly, to whom; fifthly, by whom; and sixthly, when it should be given. Excuses for want of notice will be considered in the next chapter.

## SECTION I.

## OF THE FORM OF THE NOTICE.

THIS is so far immaterial that neither the law nor mercantile usage prescribes any exact form or phraseology to be used invariably, or even generally.<sup>(u)</sup> But there are certain essential requisites which the notice must contain; and these must be fully stated, accurately and intelligibly. In theory, a notice should describe the bill or note in such a way that it could not

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<sup>(u)</sup> *Thompson, J., Bank of Alexandria v. Swann*, 9 Pet. 33. In *Hartley v. Case*, 4 B. & C. 339, the rule is stated by Lord *Tenterden*, C. J. as follows: "There is no precise form of words necessary to be used in giving notice of the dishonor of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." So *Fletcher, J., Housatonic Bank v. Laffin*, 5 Cush. 546; *Kilgore v. Bulkley*, 14 Conn. 362; *Reedy v. Seixas*, 2 Johns. Cas. 337; *Spann v. Baltzell*, 1 Fla. 301; *Brewster v. Arnold*, 1 Wisc. 264.

be mistaken ; should state the presentment, and the dishonor of it ; should be dated ; should say that the party to whom the notice is sent is looked to for payment ; should state where the note is, that the party notified may find it ; and should state who the holder is, and who gives the notice, or at whose request it is given. Such at least are the elements of a full, regular, and perfectly safe notice. And formerly courts have looked upon all of these as so far essential, that the entire failure of any one of them would go far to vitiate the notice.

Perhaps this early strictness was excessive ; but it is at least quite as certain that the laxity shown in some modern cases, in which far too much regard is paid to the seeming equity of the particular case, has tended to create much difficulty in determining what is now absolutely essential to the sufficiency of a notice. In some case or other almost every one of the elements above enumerated has been disregarded ; and there seems to be a general consent, especially of the American courts, that some of these are quite unnecessary. In a brief but very excellent treatise on Bills,<sup>(v)</sup> published in England, it is said : “ All that is necessary is to apprise the party liable of the dishonor of the bill in question, and to intimate that he is expected to pay it.” But the weight of American authority is against the express requirement of the statement of demand, and it would therefore follow that nothing more is necessary than a statement that the bill or note is dishonored. But this seems to us to be going somewhat too far.

All the cases agree that the dishonor of the bill or note must be clearly stated ; indeed, it is difficult to see that the notice could be effectual for any purpose whatever, if this were omitted.<sup>(w)</sup> The rule, as stated in some of the English cases, is, that it ought to appear on the face of the instrument “ in express terms, or by necessary implication,” that the bill or note was presented and dishonored.<sup>(x)</sup> But this method of laying down the rule has

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(v) Byles on Bills, 213. In Chitty on Bills, 10th Lond. ed., 299, it is stated that, “ there are two requisites which are indispensable to a good notice, namely, a description of the bill and an intimation of its being dishonored.”

(w) *Solarte v. Palmer*, 7 Bing. 530, 1 Crompt. & J. 417, 1 Tyrw. 371. This case was taken from the Exchequer Chamber to the House of Lords, and confirmed there. 1 Bing. N. C. 194, 8 Bligh, N. S. 874, 2 Clark & F. 93 ; *Gilbert v. Dennis*, 3 Mot. 495. See *Lockwood v. Crawford*, 18 Conn. 361.

(x) *Tindal, C. J., Solarte v. Palmer*, 7 Bing. 530, 1 Crompt. & J. 417, 1 Tyrw. 371. The rule is so stated by *Park, J.* in this case, as decided by the House of Lords in



been objected to as too stringent, and it has been said that "it is enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him."(*y*) It is difficult to reconcile the cases in that country as to what form of words amounts to a satisfactory information respecting the fact of dishonor, and to deduce any general rules which may apply to all cases. It seems to be well settled, however, that the mere statement of the fact that a note or bill is unpaid is insufficient;(*z*) but if in addition some words which apply to the protest are used, such as "noting,"(*a*) "charges,"(*b*) &c., the defect will be remedied. With respect to the word "returned," there seems to have been a conflict of opinion between the Court of Common Pleas and those of the Exchequer and the Queen's Bench, the former having been of opinion that it was not sufficient,(*c*) and the latter that it was, because it was a technical expression well understood as applying to negotiable paper which has been dishonored.(*d*) The word "dishonored" is sufficient.(*e*) It would seem that less strictness is required in case of a verbal notice than where it is written, or that a want of precision in the notice may be cured by the answer. Thus, when the clerk of the holder, the day after the maturity of the bill, told the drawer that the bill

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*i* Bing. N. C. 194. It is so laid down by *Tindal*, C. J., in *Boulton v. Welsh*, 3 Bing. N. C. 688.

(*y*) *Parke*, B., *Hedger v. Steavenson*, 2 M. & W. 799.

(*z*) *Boulton v. Welsh*, 3 Bing. N. C. 688; *Strange v. Price*, 10 A. & E. 125; *Phillips v. Gould*, 8 Car. & P. 355; *Furze v. Sharwood*, 2 Q. B. 388; *Bailey v. Porter*, 14 M. & W. 44, seems inconsistent with the previous cases; but it will be seen that the bill was accepted payable at a specified place. It will be remarked, however, that no stress was laid upon this fact in the language of the judges who delivered opinions. This rule was much relaxed in *Paul v. Joel*, 3 H. & N. 455, where the notice was, that "A's acceptance to B, £500, due, &c., is unpaid. Payment to C. & Co. is requested before 4 o'clock." Held sufficient.

(*a*) *Hedger v. Steavenson*, 2 M. & W. 799; *Armstrong v. Christiani*, 5 C. B. 687.

(*b*) *Grugeon v. Smith*, 6 A. & E. 499; *Everard v. Watson*, 1 Ellis & B. 801.

(*c*) *Boulton v. Welsh*, 3 Bing. N. C. 688. But the later cases in this court seem to be receding from the ground first taken. See *Tindal*, C. J., *Messenger v. Southey*, 1 Man. & G. 76.

(*d*) *Hedger v. Steavenson*, 2 M. & W. 799; *Lewis v. Gompertz*, 6 id. 399; *Grugeon v. Smith*, 6 A. & E. 419; *Furze v. Sharwood*, 2 Q. B. 388. See the remarks of *Little-dale* and *Coleridge*, JJ., in *Strange v. Price*, 10 A. & E. 125.

(*e*) *Woodthorpe v. Lawes*, 2 M. & W. 109; *Stocken v. Collin*, 7 id. 515; *Rowlands v. Springett*, 14 id. 7; *King v. Bickley*, 2 Q. B. 419; *Smith v. Boulton*, 1 Hurl. & W. 3.

had been duly presented, and that the acceptor could not pay it, and the drawer replied that he would see the holder about it, this was held to be sufficient evidence to warrant the jury in finding that the fact of the dishonor of the note was sufficiently communicated to the drawer.<sup>(f)</sup> Some of the later cases seem to relax the very stringent rule as originally laid down, and the first authoritative decisions have been sometimes regretted. But the rules of law on this subject are still exact.<sup>(g)</sup>

(f) *Metcalf v. Richardson*, 11 C. B. 1011. See *Paul v. Joel*, 3 H. & N. 455.

(g) *Purke, B., Allen v. Edmundson*, 2 Exch. 719; Lord Campbell, C. J., *Everard v. Watson*, 1 Ellis & B. 801. The following notices have been held insufficient, for not stating the fact of dishonor. "I am desired to apply to you for the payment of the sum of £150, due to myself, on a draft drawn by Mr. Case on Mr. Case, which I hope you will, on receipt, discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." *Hartley v. Case*, 4 B. & C. 339. "A bill drawn by Mr. J. K. upon Messrs. J. & Co., and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. A., with directions to take legal measures for the recovery thereof, unless immediately paid to yours," &c. *Solarte v. Palmer*, 7 Bing. 530, *supra*, p. 467, note *w*. "The promissory note, &c. became due yesterday, and is returned to me unpaid." *Boulton v. Welsh*, 3 Bing. N. C. 688. "Messrs. S. & Co. inform Mr. P. that J. B.'s acceptance, &c. is not paid; as indorser, Mr. P. is called upon," &c. *Strange v. Price*, 10 A. & E. 125. "A bill, &c. lies at my office unpaid." *Phillips v. Gould*, 8 Car. & P. 355. "The bill, &c. is not took up, and 4s. 6d. expenses; and the money I must pay," &c. *Messenger v. Southey*, 1 Man. & G. 76. "A bill, &c. is unpaid, and the person at whose house it is made payable don't speak very favorably of the acceptor's punctuality." *Furze v. Sharwood*, 2 Q. B. 388. "A bill, &c. is unpaid, and lies due at Mr. J. F.'s," &c. *Id.* "A bill, &c. lies due and unpaid at my house." *Id.* "W. H.'s acceptance, &c. is unpaid. He has promised to pay it in a week or ten days," &c. *Id.*

The following notices were held to state the fact of dishonor sufficiently. "Your note has been returned dishonored." Lord Abinger, C. B., *Edmonds v. Cates*, 2 Jur. 183. "Mr. E is unable to pay the note for a few days; he says he shall be ready in a week," &c. *Margesson v. Goble*, 2 Chitty, 364. "A promissory note, &c., has been returned unpaid, and I have to request that you will please remit the amount thereof, with 1s. 6d. noting." *Hedger v. Steavenson*, 2 M. & W. 799. "A bill, &c. is dishonored and unpaid, and I am desired to give you notice thereof, and request that the same may be immediately paid." *Woodthorpe v. Lawes*, 2 M. & W. 109. "A bill, &c. has been presented for payment to the acceptor thereof, and returned dishonored, and now lies overdue and unpaid," &c. *Lewis v. Gompertz*, 6 M. & W. 400. "I am instructed to give you notice that a bill, &c. has been dishonored." *Stocken v. Collin*, 7 M. & W. 515. "An acceptance, &c. is unpaid, and I request your immediate attention to it." *Bailey v. Porter*, 14 M. & W. 44. "Bill, &c. dishonored." *Rowlands v. Springett*, 14 M. & W. 7. "The bill is this day returned, with charges." *Grurgeon v. Smith*, 6 A. & E. 499. "The acceptance, &c. has been presented for payment, and returned, and now remains unpaid." *Cooke v. French*, 10 A. & E. 131, note *b*. "Your draft, &c. is returned to us unpaid, and if not taken up this day, proceedings will be taken against you for the recovery thereof." *Robson v. Curlewis*, 2 Q. B. 421. "A bill, &c. lies at, &c., dishonored." *King v. Bickley*, *id.* 419. "We beg to acquaint you with the non-payment of A's acceptance, &c., amounting, with expenses,

Although in some of the cases in America the rule is stated in the words of Lord Tindal, C. J. and Parke, J., yet it does not seem to be so stated generally, and the tendency of the authorities is towards the more liberal application ; (*h*) but still it is clear that something more than the mere fact of non-payment must appear. (*i*) The reason is, that it does not follow that a note is dis-

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to, &c., which remit to us in course of post, without fail." *Everard v. Watson*, 1 Ellis & B. 801. "A bill, &c. became due, &c., and is unpaid. Noting, 5s." *Armstrong v. Christiani*, 5 C. B. 687. A notice by an attorney as follows: "I am requested to apply to you for payment of, &c., the amount of an overdue acceptance drawn by you, &c., and to inform you that, unless the same be paid to me, with noting, interest, and 5s. for this application, proceedings will be taken," &c. *Wathen v. Blackwell*, 6 Jur. 738. A parol notice to the following effect: "I called to tell Mr. A. that a bill, &c. was presented, &c., is unpaid and dishonored," &c. *Smith v. Boulton*, 1 Hurl. & W. 3.

(*h*) *Story, J.*, *Mills v. Bank of U. S.*, 11 Wheat. 431 ; *Shaw, C. J.*, *Gilbert v. Dennis*, 3 Met. 495 ; *Beardsley, J.*, *Wynn v. Alden*, 4 Denio, 163.

(*i*) *Gilbert v. Dennis*, 3 Met. 495 ; *Pinkham v. Macy*, 9 id. 174 ; *Dole v. Gold*, 5 Barb. 490 ; *Ransom v. Mack*, 2 Hill, 587 ; *Sinclair v. Lynah*, 1 Speers, 244 ; *Townsend v. Lorain Bank*, 2 Ohio State, 345 ; *Armstrong v. Thruston*, 11 Md. 148 ; *Manning v. Hays*, 6 id. 5 ; *Boehme v. Carr*, 3 id. 202 ; *Nailor v. Bowie*, id. 251 ; *Graham v. Sangston*, 1 id. 59. In *Gilbert v. Dennis*, 3 Met. 495, *Shaw, C. J.* said, after referring to the case of *Mills v. U. S. Bank*, 11 Wheat. 431, which had been cited in argument as an authority to show that the notice need not state the fact of dishonor: "As to the sufficiency of the notice, the opinion was delivered by Mr. Justice Story. Some particular expressions, taken alone, would seem to warrant the position for which it is cited. But taking the whole together, and in reference to the case then before the court, we think it is not opposed to the rule as stated in the English cases." After carefully reviewing the authorities, the learned judge continued: "We have thus attempted, at the risk of being somewhat tedious, to ascertain what the true rule is upon this subject, on account of the extreme importance of certainty and uniformity in the rules of law applicable to the rights and duties of holders and other parties to notes and bills of exchange. And we take that rule to be, that, as an indorser is liable only conditionally for the payment, in case of a dishonor of the note at its maturity by the maker, and notice thereof to the indorser, in order to charge him, notice of such dishonor must be given him by the holder or his agent, or some party to the bill ; that mere notice of non-payment, which does not express or imply notice of dishonor, is not such notice as will render the indorser liable. . . . This notice comes from an individual, not from a bank. It was delivered at 11 A. M. There would then be no default and no dishonor, unless a demand had been made on the promisor. An averment, therefore, that it was unpaid, did not, by necessary implication, or reasonable intendment, amount to an averment or intimation that payment had been demanded and refused, or that the note had been otherwise dishonored." Some of the earlier cases seem to have been less strict, and to have decided that a notice was sufficient if it put the indorser on inquiry ; but we are aware of no recent decisions to this effect. See *Bank of Cape Fear v. Seawell*, 2 Hawks, 560 ; *Chewning v. Gatewood*, 5 How. Miss. 552 ; *Bank of U. S. v. Norwood*, 1 Harris & J. 423 ; *Sussex Bank v. Baldwin*, 2 Harrison, 487, 490 ; *Shrieve v. Combs*, 1 Littell, 194 ; *Reedy v. Seixas*, 2 Johns. Cas. 337 ; *Bank of Rochester v. Gould*, 9 Wend. 279.

The following notice was held sufficient, the note being payable at a specified place :  
 "I addressed written notices to the indorsers of the note therein, informing them that

honored because it is unpaid, for we have seen that the holder is obliged to use reasonable diligence to find the maker and acceptor, and to present the bill to him. This does not apply where a note or bill is made payable at a specified place, and consequently the notice may be sufficient in such a case if it appear simply that the note or bill was unpaid.(j) The word "protested" used in a notice clearly implies that the note or bill has been dishonored, in all cases where a protest is necessary ; (k) and by the weight of authority this word sufficiently designates that the necessary steps have been taken even in the case of inland bills (l) and promissory notes, (m) where the law does not require a protest.

In the earlier English cases it has been regarded as a third requisite to a valid notice, that it should state that the party to whom the notice was sent was looked to for payment.(n) But there does not seem to have been any express decision to this point, and from the later cases it would seem to be considered that this is not essential, because it is implied from the fact of the bill being protested.(o)

they were severally held liable for the payment thereof." *Graham v. Sangston*, 1 Md. 59. So were the following notices, where the note was payable at a bank. "The note of, &c., which you indorsed, fell due this day, and remains unpaid." *Clark v. Eldridge*, 13 Met. 96. "I addressed written notices to the indorsers, &c., informing them that it had not been paid," &c. *Hunter v. Van Bomhorst*, 1 Md. 504.

(j) *Clark v. Eldridge*, 13 Met. 96. See *Pinkham v. Macy*, 9 id. 174; *Gilbert v. Dennis*, 3 id. 495; *Housatonic Bank v. Laflin*, 5 Cush. 546; *Graham v. Sangston*, 1 Md. 59; *Hunter v. Van Bomhorst*, id. 504; *Sasscer v. Farmers' Bank*, 4 id. 409.

(k) *Crawford v. Branch Bank*, 7 Ala. 205; *Spies v. Newberry*, 2 Doug. Mich. 495. In *De Wolf v. Murray*, 2 Sandf. 166, a statement by an indorsee charging the indorser with "protested exchange," giving the names of the drawer and acceptor, the amount and charges, was held sufficient to warrant a finding by the jury that this contained sufficient intimation of dishonor.

(l) *Saltmarsh v. Tuthill*, 13 Ala. 390.

(m) *Mills v. Bank of U. S.*, 11 Wheat. 431; *Bank of Alexandria v. Swann*, 9 Pet. 33; *Cook v. Litchfield*, 5 Sandf. 330, 5 Seld. 279; *Cayuga Co. Bank v. Warden*, 1 Comst. 413, 2 Seld. 19; *Youngs v. Lee*, 2 Kern. 551, 18 Barb. 187; *Beals v. Peck*, 12 Barb. 445; *Remer v. Downer*, 23 Wend. 620; *Crocker v. Getchell*, 23 Maine, 392; *Bank of Rochester v. Gould*, 9 Wend. 279; *Howe v. Bradley*, 19 Maine, 31; *Smith v. Little*, 10 N. H. 526; *Mainer v. Spurlock*, 9 Rob. La. 161; *Kilgore v. Bulkley*, 14 Conn. 362; *Housatonic Bank v. Laflin*, 5 Cush. 546; *Brewster v. Arnold*, 1 Wisc. 264; *Denebre v. Hiriart*, 6 La. Ann. 100; *Burgess v. Vreeland*, 4 N. J. 71. *Contra*, *Platt v. Drake*, 1 Doug. Mich. 296.

(n) *Buller and Ashhurst, JJ.*, *Tindal v. Brown*, 1 T. R. 169.

(o) *Miers v. Brown*, 11 M. & W. 372. *Purke, B.*, *Allen v. Edmundson*, 2 Exch. 719; *Furze v. Sharwood*, 2 Q. B. 388; *King v. Bickley*, id. 419; *Chard v. Fox*, 14 id. 200; *Cresswell, J.*, *Caunt v. Thompson*, 7 C. B. 400; *Hamilton v. Smith*, Longf. & T. 100. In *East v. Smith*, 4 Dow. & L. 744, *Coleridge, J.* made a distinction between the case

The Supreme Court of the United States has distinctly declared that a notice of dishonor addressed to a party to a note "necessarily implies" that he is looked to for payment, because "for what other purpose could it be sent?" (*p*) Such is certainly the prevailing rule at this time. (*q*) While, however, a demand is implied by a statement of dishonor, it is quite clear that as yet dishonor is not implied in a statement of demand; and it is therefore not enough to tell the party notified that he is looked to for payment, unless he is also told that the paper is dishonored. Such is the English rule, and we are not aware of any authoritative American cases which hold otherwise; although it would be easy to ask on what other ground can payment be required, and about as logical and rational to hold that dishonor was implied in demand, as that demand was implied in dishonor.

It is obvious, also, that the notice should describe the instrument so that its identity is sufficiently certain, and so that there can be no reasonable ground for mistaking it. The requirements of the law on this point would seem to be satisfied with any description which, under all the circumstances of the case, so designates and distinguishes the note or bill as to leave no doubt in the mind of the indorser, as a reasonable man, what note was intended. (*r*) There is, however, much uncertainty in the adjudication of our various courts, and it is not easy to say, either on reason or authority, what the law actually requires. Thus it has been held in England, that notice to the drawer that his draft on the drawee, naming the latter, was dishonored, was *prima facie* sufficient, although neither the date, amount, time of maturity, &c. was specified. (*s*) It has been held in America, that a notice to

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of a notice coming directly from the holder and one not coming immediately from him, intimating that in the former no statement that the party receiving the notice was looked to for payment was necessary, and in the latter, that such statement should be made.

(*p*) *Bank of U. S. v. Carneal*, 2 Pet. 543.

(*q*) *Cowles v. Harts*, 3 Conn. 516; *Warren v. Gilman*, 17 Maine, 360; *Townsend v. Lorain Bank*, 2 Ohio State, 345; *Barstow v. Hiriart*, 6 La. Ann. 98; *Burgess v. Vreeland*, 4 N. J. 71; *Shrieve v. Duckham*, 1 Littell, 194. See *Ransom v. Mack*, 2 Hill, 587.

(*r*) See *Shaw*, C. J., *Gilbert v. Dennis*, 3 Met. 495, 498; *Shelton v. Braithwaite*, 7 M. & W. 436.

(*s*) *Shelton v. Braithwaite*, 7 M. & W. 436. In *Stockman v. Parr*, 11 id. 809, the only description of the bill sued on, in an action against the drawer, was, "£53 11s. 6d. due on your dishonored note, dated 19th of December last." The amount of the bill was £53, the charges being 6s. 6d. This was held sufficient.

an indorser of a note, simply stating the name of the maker, the amount, and the fact that it was indorsed by the party to whom the notice was sent, was a sufficient description.<sup>(t)</sup> But in such cases it is open to the defendant to prove any circumstances tending to show that such a description was insufficient to apprise him what note was intended. He may show, for instance, such facts as that there were two or more notes or bills to which the terms of the notice might equally apply, and then the notice might be void for uncertainty as to the description.<sup>(u)</sup> It has been

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(*t*) *Housatonic Bank v. Laffin*, 5 Cush. 546; *Beals v. Beck*, 12 Barb. 245; *Youngs v. Lee*, 18 id. 187, 2 Kern. 551; *Kilgore v. Bulkley*, 14 Conn. 362. In *Wheaton v. Wilmarth*, 13 Met. 422, the notice, in addition to these facts, stated the date when the note was due, and was held sufficient. So *Bank of Rochester v. Gould*, 9 Wend. 279. In *Cook v. Litchfield*, 5 Seld. 279, 5 Sandf. 330, the notice stated the name of the maker, the amount and date of the note, the indorsement, and also information that it was protested on the same day it became due. This was held to describe the note sufficiently. The notice need not state the name of the holder, *Mills v. Bank of U. S.*, 11 Wheat. 431, *Bradley v. Davis*, 26 Maine, 45; nor at whose request the notice was given, *id.*, *Shed v. Brett*, 1 Pick. 401; nor where the demand was made, *Mills v. Bank of U. S.*, 11 Wheat. 431; nor when a note was protested, *Cook v. Litchfield*, *supra*; nor where the bill is lying, nor on whose behalf payment is demanded, *Woodthorpe v. Lawes*, 2 M. & W. 109, *Housego v. Cowne*, *id.* 348, *Harrison v. Ruscoe*, 15 id. 231; nor at what hour the note was presented at a bank, *Fleming v. Fulton*, 6 How. Miss. 473; nor that the party presenting had the paper with him at the time, nor the name of the drawee, *Mainer v. Spurlock*, 9 Rob. La. 161; nor the fact of payment, nor the absence of the maker when the note was presented, *Sanger v. Stimpson*, 8 Mass. 260; nor at what time payment was due, *Denegre v. Hiriart*, 6 La. Ann. 100. In *Wynn v. Alden*, 4 Denio, 163, the notice, which had no date, stated that the note had been "this day presented for payment." Held defective. *Sed quere*. In *Cayuga Co. Bank v. Warden*, 1 Comst. 413, 2 Seld. 19, the notice to each of two joint indorsers stated that the note was indorsed "by you." It was objected, that this described the indorsement as a several one, when it was joint, but the court overruled the objection.

(*u*) In the cases cited *supra*, note *s*, the reason given for the decision was, that it did not appear that there were any other bills to which the notice could apply, and therefore the indorser could not have been misled. In *Cook v. Litchfield*, 5 Seld. 279, there were four notes of the same maker, indorser, date, and amount, but payable respectively at nine, ten, eleven, and twelve months from the common date. The notices were alike in all respects except their dates, and in two the amount of the interest due was stated in the margin. It was held that the first notice was sufficient, no other note to which the notice was applicable having, at that time, become due; but that the notice was insufficient as regarded the three other notes, because there were, at the time each became due, two or more notes in existence to which the terms of the notice would equally apply. It will be seen that each notice was dated the day when the note to which it referred fell due, and the only reference to the time of maturity contained in the body of the notice was the fact of protest "on the day when the same became due." It is somewhat difficult, we think, to answer the objection to this case, that on the day the second notice was received the indorser could not have considered it as referring to the first note, because he had already received notice of the dishonor of that note a



held that the notice should state the name of the maker of the note, *(v)* and also the date of the presentment, *(w)* but it may be doubted whether the latter is essential. A verbal notice in which the only words of description were "the note" has been held sufficient, it appearing from the conversation that the indorser understood what note was referred to. *(x)* The authorities are conflicting as to the point whether the question of sufficiency of the description in the notice is one for the court or the jury to decide. We should say, that on principle the court ought to determine the point, which is not whether the party notified was misled or deceived, but whether he might, under all the circumstances, as a reasonably prudent man, have been deceived. *(y)* But there are authorities which hold that the matter depends on whether the indorser has been actually misled or deceived, and that this is a fact which the jury alone can decide. *(z)*

The effect of a misdescription of the note in the notice has been somewhat considered, and here also the authorities are in an unsatisfactory state. It is said that the law in England "now is, that any misdescription which does not mislead is immaterial, and does not vitiate the notice." *(a)* It would follow from this view that a jury should determine the question, for it must be a matter of fact in each case whether the indorser was misled or

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month previous. The court held that it could not apply to the third or fourth note, because these were not at this time due. The judgment of the Superior Court, 5 Sandf. 330, was overruled. *Duer, J.*, in his opinion in the latter court, said: "Nor can we doubt that, in each case, the note thus arrived at maturity was understood by the defendant to be the note dishonored. That he was in fact misled is most improbable; that he ought not to have been misled is quite certain." The only answer to the above objection, given by *Ruggles, C. J.*, in the Court of Appeals, was, that "it is not strong enough to sustain the plaintiff's demand, without violating a settled and salutary principle of law. The description of the note should be sufficiently certain to enable the indorser to know to what one in particular the notice applies. . . . In the present case, the defendant indorsed four notes which were alike in all respects, excepting in regard to the time of payment; and yet the notices omitted to describe them with reference to that important particular, by which only they could be distinguished one from the other."

*(v)* *Home Ins. Co. v. Green*, 19 N. Y. 518.

*(w)* *Wynn v. Alden*, 4 Denio, 163, *supra*, p. 473, note *t*.

*(x)* *Woodin v. Foster*, 16 Barb. 146.

*(y)* *Crawford v. Branch Bank*, 7 Ala. 205. See *Mainer v. Spurlock*, 9 Rob. La. 161, and the cases cited *infra*, p. 475, note *b*, and p. 477, note *r*.

*(z)* *Kilgore v. Bulkley*, 14 Conn. 362. See the cases cited *infra*, p. 475, note *b*.

*(a)* Chitty on Bills, 10th Lond. ed., 299. The cases cited in support of this doctrine are *Bromage v. Vaughan*, 9 Q. B. 608; *Mellersh v. Rippen*, 7 Exch. 573; and *Smith v. Whiting*, 12 Mass. 6.



not, and many authorities adopt this view.(b) But our opinion, independently of authorities, would be, that if it were intended to describe the proper note, and the description of the note be such that a reasonably prudent man, under the circumstances of the case, ought to know what note was intended to be described, the misdescription would not invalidate the notice, and that it would be immaterial whether the indorser were misled in fact or not. This must be deducible mainly from the notice itself, and by construction, although facts could come in to help the construction, and therefore we should prefer to consider the matter as a question of law for the court, and there are authorities to this effect.(c)

One of the circumstances which would have much effect here would be the existence or absence of other notes by the same parties, to which the terms of the notice would equally apply; and here, also, the burden of proving this would be upon the party seeking to invalidate the notice.(d) It has been held that a notice addressed to an indorser, and describing him as *drawer*, was insufficient.(e) But notices describing the drawer as the acceptor,(f) a note as a bill,(g) a bill as a note,(h) were suf-

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(b) *Stockman v. Parr*, 11 M. & W. 809; *Smith v. Whiting*, 12 Mass. 6; *Reedy v. Seixas*, 2 Johns. Cas. 337; *Bank of Rochester v. Gould*, 9 Wend. 279; *McKnight v. Lewis*, 5 Barb. 681; *Ross v. Planters' Bank*, 5 Humph. 335; *Moorman v. Bank of Alabama*, 3 Port. Ala. 353. See *Carter v. Bradley*, 19 Maine, 62.

(c) In *Remer v. Downer*, 23 Wend. 620, 25 id. 277, the Court of Appeals reversed the decision of the Supreme Court, as reported in 21 id. 10, where it was left to the jury to decide the matter; but the ground for the reversal does not appear clearly. *Bronson, J.*, in *Ransom v. Mack*, 2 Hill, 587, thinks the decision proceeded upon the ground that the court should have decided the question, and not the jury. In *Mills v. Bank of U. S.*, 11 Wheat. 431, the judge directed the jury to find the notice good, if no other note, of the same parties, and payable at the same place, had been proved to their satisfaction to exist; and this charge was held correct. This would seem to be treating the question as a matter of law. It was so treated in *Bank of Alexandria v. Swann*, 9 Pet. 33, and in *Cayuga Co. Bank v. Warden*, 1 Comst. 413, 2 Seld. 19. See the cases cited *supra*, p. 474, note y.

(d) *Mills v. Bank of U. S.*, 11 Wheat. 431; *Bank of Alexandria v. Swann*, 9 Pet. 33; *Reedy v. Seixas*, 2 Johns. Cas. 337; *Cayuga Co. Bank v. Warden*, 1 Comst. 413, 2 Seld. 19. See *supra*, p. 473, note u.

(e) *Beauchamp v. Cash*, 1 Dow. & R., N. P. 3. See next note.

(f) *Mellersh v. Rippen*, 7 Exch. 578. The case of *Beauchamp v. Cash*, 1 Dow. & R., N. P. 3, which held a notice to be bad because the indorser of a bill was described as the drawer, must be considered as overruled.

(g) *Messenger v. Southey*, 1 Man. & G. 76.

(h) *Stockman v. Parr*, 11 M. & W. 809, *supra*, p. 472, note s.

ficient. Also, misdescription of the amount, *(i)* names of the parties, *(j)* date of the note, *(k)* the place where the bill or note was payable, *(l)* or where it was lying, *(m)* or where it fell due, *(n)* have been held immaterial. Whether a misstatement as to the time when the note or bill was presented or protested is sufficient to invalidate the notice is unsettled, the authorities being conflicting. *(o)* But the reasons for holding the notice ineffectual, because by this or any other inaccuracy the notice informs the indorser in reality that he is discharged, seem to be quite strong. There is also a conflict on this point with respect to whether this is a question of law or fact. *(p)* Although a misstatement may not be material as regards the invalidity of the notice, yet it may have some effect in other respects. Thus, if a notice misstated the name of the person on whose behalf it was given, the effect of this would probably be to place the party giving it in the same situation as to the party to whom it was given as if the representation had been true, and therefore the latter would have every defence against the former that he would have if the notice had been really given by the party named. *(q)* Upon the whole, we must content ourselves with saying that the notice should contain all the facts which we have before enumerated, in order

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*(i)* Reedy *v.* Seixas, 2 Johns. Cas. 337; Bank of Alexandria *v.* Swann, 9 Pet. 33; Cayuga Co. Bank *v.* Warden, 1 Comst. 413, 2 Seld. 19; McKnight *v.* Lewis, 5 Barb. 681; Bank of Rochester *v.* Gould, 9 Wend. 279; Rowan *v.* Odenheimer, 5 Smedes & M. 44; Snow *v.* Perkins, 2 Mich. 238.

*(j)* Smith *v.* Whiting, 12 Mass. 6. where the maker, whose name was Jotham Cushman, was called Jotham Cushing; Moorman *v.* Bank of Alabama, 3 Port. Ala. 353, where a subsequent indorser was described as Pyron, when his name was Byron; Dennistoun *v.* Steward, 17 How. 606; Carter *v.* Bradley, 19 Maine, 62.

*(k)* Mills *v.* Bank of U. S., 11 Wheat. 431; Ross *v.* Planters' Bank, 5 Humph. 335; Tobey *v.* Lennig, 14 Penn. State, 483.

*(l)* Bromage *v.* Vaughan, 9 Q. B. 609.

*(m)* Rowlands *v.* Springett, 14 M. & W. 7.

*(n)* Smith *v.* Whiting, 12 Mass. 6.

*(o)* That the notice was ineffectual was held, as a matter of law, in Ransom *v.* Mack, 2 Hill, 587; Routh *v.* Robertson, 11 Smedes & M. 382; Etting *v.* Schuylkill Bank, 2 Penn. State, 355; Townsend *v.* Lorain Bank, 2 Ohio State, 345. *Contra*, Ontario Bank *v.* Petrie, 3 Wend. 456; Crocker *v.* Getchell, 23 Maine, 392. The reason given here was that the indorser could not have been misled. In the former case, the matter was left with the jury; in the latter, the court seem to have decided it. It will be seen, however, that in the latter case the mistake was apparent upon the face of the notice.

*(p)* See the cases in note *o*, *supra*.

*(q)* Harrison *v.* Ruscoe, 15 M. & W. 231.

that it may be sure to answer its purpose; but there is much uncertainty as to most of them, as we have already seen. Where the facts are not in dispute, and are independent of the matter of description, misdescription, or misinformation, our leading authorities hold that the sufficiency of the notice, if in writing, is to be determined by the court.<sup>(r)</sup>

## SECTION II.

### OF THE MANNER IN WHICH NOTICE SHOULD BE GIVEN.

THE notice is usually in writing, but it seems to be sufficient to satisfy the law if it be oral only; <sup>(s)</sup> but it can be much more easily and certainly proved if in writing, and in mercantile matters any departure from established customs is objectionable and generally suspicious. Personal service is never necessary. It is said to be sufficient to leave a written notice at the dwelling or counting-room of the parties, or a verbal notice with any one who may be found there.<sup>(t)</sup> This rule must, however, receive a reasonable interpretation. It would not, for example, be sufficient to leave the notice with one known to be casually there for a temporary purpose; nor with one who was obviously unable to comprehend or deliver a message. Notice is usually sent by mail in London, and in this country where the sender and the

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<sup>(r)</sup> *Dole v. Gold*, 5 Barb. 490; *Wynn v. Alden*, 4 Denio, 163; *Townsend v. Lorain Bank*, 2 Ohio State, 345; *Platt v. Drake*, 1 Doug. Mich. 296; *Brewster v. Arnold*, 1 Wisc. 264. It seems to have been so treated in *Gilbert v. Dennis*, 3 Met. 495; *Pinkham v. Macy*, 9 Met. 174. *Contra*, it would seem, *Paul v. Joel*, 3 H. & N. 455; *De Wolf v. Murray*, 2 Sandf. 166. In *McKnight v. Lewis*, 5 Barb. 490, the distinction is taken between a notice defective on its face and one in which the note is misdescribed. The case of *Cayuga Co. Bank v. Warden*, 1 Comst. 413, 2 Seld. 19, is relied upon; but in that case the court decided the question themselves. It would seem that an indorser might equally be deceived, where the notice does not convey sufficient information respecting the note or the circumstances attending its dishonor, as well as where it contains some error or mistake.

<sup>(s)</sup> *Cuyler v. Stevens*, 4 Wend. 566; *Woodin v. Foster*, 16 Barb. 146; *Shaw, C. J.*, *Gilbert v. Dennis*, 3 Met. 495; *Glasgow v. Pratte*, 8 Misso. 336; *Metcalf v. Richardson*, 11 C. B. 1011; *Caunt v. Thompson*, 7 id. 400; *Housego v. Cowne*, 3 M. & W. 348; *Phillips v. Gould*, 8 Car. & P. 355; *Smith v. Boulton*, 1 Hurl. & W. 8.

<sup>(t)</sup> See *infra*.

party addressed do not live in the same town.(u) And if properly sent by mail, the law, which for certain purposes seems to guarantee a discharge of their duties by persons employed by the State, or to assume such due discharge as a fact, holds the sender relieved from all consequences of a miscarriage, as has been already intimated in respect to demand. In other words, the sender is bound to use due diligence; and on this point it is sufficient diligence if the letter be put into a regular post-office; for it cannot be asked of any sender that he should have any oversight of, or interference with, the public service of the post-office. And therefore he is held to no liability for accident there, however it may happen.(v)

The same rule would undoubtedly apply to an international mail service by water. But if the sender prefer sending the notice by his own messenger, or by any other means, he may do so; (w) it is not, however, quite certain what his responsibility now is. It may be that the due diligence required of him is sat-

(u) See *infra*, pp. 481, 482.

(v) In the following cases it was held that putting a letter, properly directed, and at a proper time, in the post-office was sufficient, without proof of its reception. *Saunderson v. Judge*, 2 H. Bl. 509; *Parker v. Gordon*, 7 East, 385; *Bussard v. Levering*, 6 Wheat. 102; *Lindenberger v. Beall*, id. 104; *Munn v. Baldwin*, 6 Mass. 316; *Stanton v. Blossom*, 14 id. 116; *Ogden v. Cowley*, 2 Johns. 274; *Ellis v. Commercial Bank*, 7 How. Miss. 294; *Commercial Bank v. Strong*, 28 Vt. 316. See *Walters v. Brown*, 15 Md. 285; *Haly v. Brown*, 5 Penn. State, 178; *Smyth v. Hawthorn*, 3 Rawle, 355; *Hartford Bank v. Hart*, 3 Day, 491. See *Shepard v. Hall*, 1 Conn. 329. In *Miller v. Hackley*, 5 Johns. 375, the notary testified that it was his usual practice to mail notices to indorsers living at a distance the evening of the day of protest, and that he had no doubt but that he had done so with the notice in the case in suit, though he could not recollect positively. Held sufficient. But in *Dale v. Lubbock*, 1 Barnard. 199, *Raymond*, C. J. "did not think the bare sending of a letter to the post-house would be sufficient, without some further proofs of the acceptor's receiving it." In the following cases there was evidence of a delay in the transmission by mail. *Dickins v. Beal*, 10 Pet. 572; *Mount Vernon Bank v. Holden*, 2 R. I. 467; *Dobree v. Eastwood*, 3 Car. & P. 250; *Stocken v. Collin*, 7 M. & W. 515; *Woodcock v. Houldsworth*, 16 M. & W. 124. In the following cases there was evidence that the notice was not received. *Shed v. Brett*, 1 Pick. 401; *Renshaw v. Triplett*, 23 Misso. 213; *Chapman v. Lipscombe*, 1 Johns. 294, where, from the circumstances of the case, the notice could not have come to the hands of the party to whom it was sent. In *Jones v. Wardell*, 6 Watts & S. 399, there was a delay owing to the fact that the wrong person, of the same name with the indorser, took the notice out of the post-office. The indorser was held.

(w) *Jarvis v. St. Croix Manuf. Co.*, 23 Maine, 287; *Bancroft v. Hall*, Holt, N. P. 476; *Pearson v. Crallan*, 2 J. P. Smith, 404; *Whitehead, J., Hazelton Co. v. Ryerson*, Spencer, 129.

isfied with reasonable care in selecting his messenger or servant ; but perhaps it should be held that he may select either to employ a public servant, and then the responsibility is off his hands as soon as the notice is delivered to the mail ; or he may elect to send it by his own private conveyance, and then his responsibility continues until due delivery to the person to be notified.(x) We think this latter view is more consonant with the true principles of the case, and should be unwilling to admit an exception to it, unless, perhaps, where the sender could not be said to elect, because there was no public conveyance between him and the person to be notified.(y) Then it becomes his duty to send the notice in the best and safest way he can ; and if he exercises a sound discretion in selecting and in using that way, he might be safe from the consequences of a miscarriage which could not be attributed to him as a fault. Where it should be sent by mail, but is sent by a private messenger, it seems that if it arrives on the same day on which the mail would bring it, and later in the day, it is still sufficient if it comes within business hours ;(z) but if it does not come until the day after, this delay vitiates the notice.(a)

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(x) In *Van Vechten v. Pruyn*, 3 Kern. 549, 555, *Johnson, J.* said : " Where the service is by mail, the duty of the holder is discharged by depositing the notice in the post-office, properly directed. Whether it ever reaches the indorser or not, his liability is fixed. On the other hand, where personal notice is to be given, the obligation is upon the holder to leave the notice, either with the party to be charged, or at his residence or place of business. In these cases, there is no risk in transmission to be borne by the indorser."

(y) In *Bank of Columbia v. Lawrence*, 1 Pet. 578, 584, *Thompson, J.* said : " In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such cases can arise, but they will seldom if ever occur, and at all events such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of *Pearson v. Crallan*, 2 J. P. Smith, 404, is one of this description. But in that case the court did not say that it was necessary to send a special messenger, and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases, but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay, is at least very questionable."

(z) *Bancroft v. Hall*, Holt, 476.

(a) See *Beeching v. Gower*, Holt, 315, note ; *Darbishire v. Parker*, 6 East, 3. In *Jarvis*

If the want of an early post would cause a considerable delay, and the parties were near, so that notice could easily and cheaply be sent by private hand, we should say, however, that it ought to be sent so; and a long delay could not be justified. (b) It has been held, that, where a private messenger was employed, a holder might in such a case charge the person addressed a reasonable sum for the expense of doing so. (c) It has been held, that a bank which holds a note for collection, and exercises due care in selecting a notary to whom it is sent for demand, protest, and notice, is not answerable for the default of the notary. The notary public stands in some degree on the footing of the mail service, as an agent or instrument provided by law, and therefore to a certain extent guaranteed by law. The authorities are not uniform on this question; some hold the bank liable for the proper conduct of the notary employed; and those which hold the bank discharged by due care in selection seem to apply the same rule to any person selected with due care as a competent agent. (d)

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*v. St. Croix Manuf. Co.*, 23 Maine, 287, a notice had been forwarded part of the way by a private messenger. By the regular course of the mail the notice might have been received some days before its actual reception. Held, that it was incumbent upon the plaintiff to have explained this delay, and not having done so, he was nonsuited.

(b) In some cases it has been held that it was necessary to make use of a special messenger, as when the indorser lived at a considerable distance from a post-office. *Fish v. Jackman*, 19 Maine, 467; *Farmers' &c. Bank v. Butler*, 3 Littell, 498; *Barker v. Hall*, Mart. & Y. 183; *Bedford v. Hickman*, 1 Yerg. 166. See *Farmers', &c. Bank v. Battle*, 4 Humph. 86. But these may be doubted, as it will be seen hereafter that many authorities hold that, in such cases, it will be sufficient to send the notices to the nearest post-office. In *State Bank v. Ayers*, 2 Halst. 130, *Ford, J.* said: "If persons residing far from a post-town, aside from the common walks of gregarious commerce, will give their names in guaranty of commercial paper, it is better that they should be held to inquire for letters at the nearest post-office, about the time such paper comes to maturity, than that the holder should be compelled to send a special messenger fifty or one hundred and fifty miles to serve personal notice, or that an established system of notices, sufficiently complex already, should be forced to give way to the introduction of novel exceptions, imposing burdensome, expensive, and hazardous duties on all men of business, merely out of favor to eccentric residences."

(c) *Pearson v. Crallan*, 2 J. P. Smith, 404, where it was left to the jury to decide whether the special messenger was necessary, and whether the charge was reasonable.

(d) *Bellemire v. Bank of United States*, 4 Whart. 105; *Jackson v. Union Bank of Maryland*, 6 Harris & J. 146; *East Haddam Bank v. Scovil*, 12 Conn. 303; *Wingate v. Mechanics' Bank*, 10 Barr, 104; *Fabens v. Mercantile Bank*, 23 Pick. 330; *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 177; *Warren Bank v. Suffolk Bank*, 10 Cush. 582. It was so held by the Supreme Court of New York in *Allen v. Merchants' Bank*, 15 Wend. 482. The decision in this case was, however, reversed by the Court of Errors by a vote of 14 to 10, Chancellor Walworth delivering an opinion



In London, it is enough if the notice is put into any authorized receiving-house ; but it has been said not to be enough to deliver it to a "bellman" in the streets.(f) Subsequently, this, however, seems to be doubted,(g) and Lord Denman calls a bellman "an ambulatory post-office."(h) The true question must be this,—Is a bellman an officer of the state, and in substance an authorized receiver for the post-office ? If not, he should stand upon the same footing as any other carrier. Probably usage would have some effect on a question of this kind.

Proof that a letter was put on a table with others, and that it was the regular course of business of the porter of the place to take all letters so deposited to the post-office, was held to be insufficient ; but it was intimated that the evidence of the porter, that he *always* carried the letters, without any distinct recollection of this one, might have made the proof sufficient.(i) If the

in favor of affirming the judgment of the Supreme Court. 22 Wend. 215. This decision of the Court of Errors is regarded as having settled the law in New York. See *Hoard v. Garner*, 3 Sandf. 179 ; *Montgomery Co. Bank v. Albany City Bank*, 8 Barb. 396, 3 Seld. 459.

(f) In *Hawkins v. Rutt*, Peako, Cas. 186, Lord *Kenyon* held, that evidence that a letter containing bills of exchange was delivered to the bellman was no proof that the letters arrived at the post-office.

(g) In *Pack v. Alexander*, 3 Moore & S. 789, a letter containing bank-notes was given to the bellman, who put it into his mail-bag. The bellman testified that the bags are delivered locked at the post-office, and that a letter once put in could not be abstracted without the aid of the key. The jury found for the plaintiff, on the ground that there was no evidence that the letter ever reached the post-office. The court set aside the verdict as against evidence. The cases of *Hawkins v. Rutt*, and *Pack v. Alexander*, were not, it will be seen, cases involving the delivery of a notice to a postman, but letters containing money ; and it may well be doubted whether such strictness would be required in the former case as in the latter. In *Scott v. Lifford*, 9 East, 347, 1 Camp. 246, the plaintiff, living in London, sent the notice to the defendant, who resided in Shadwell, by the twopenny-post. Held sufficient. *Le Blanc*, J. said, 9 East, 348 : "I cannot rule that the holder of a bill may not avail himself of the conveyance by the twopenny-post." So the court said, 1 Camp. 249, that "they did not see why, when the parties reside in London, or the near neighborhood, the party sending the notice should not be allowed to avail himself of the convenience of the twopenny-post, but should be obliged to despatch a special messenger." In *Smith v. Mullett*, 2 Camp. 208, the notice was sent by the twopenny-post, and no objection was taken to this ; but the case turned on another point. In *Kilton v. Fairclough*, 2 Camp. 633, it was held that a notice might be sent by the twopenny-post to any place within its limits, and that distance was immaterial. In *Dobree v. Eastwood*, 3 Car & P. 250, the notice was sent by the same conveyance, the parties all residing in the same place. It was proved that there was an actual delay, but the notice was held sufficient.

(h) *Skilbeck v. Garbett*, 7 Q. B. 846, 849.

(i) *Hetherington v. Kemp*, 4 Camp. 193. In *Skilbeck v. Garbett*, 7 Q. B. 846, a



parties live in the same town, the American cases hold, very generally, that the mail is not the proper instrument, or rather that it has no advantage in law over any other means.(j) So, according

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clerk of the plaintiff testified that, in the general course of business at the plaintiff's office, letters were made up by him, and the public postman called every day for the letters, which were placed in a box in the room where the witness sat, and were taken from the box by the postman. The witness testified that the letter in question was made up in the usual course, but no further evidence was given as to the sending. Held sufficient. See also *Brailsford v. Williams*, 15 Md. 150; *Bell v. Hagerstown Bank*, 7 Gill, 216; *Flack v. Green*, 3 Gill & J. 474; *Miller v. Hackley*, 5 Johns. 375, *supra*, p. 478, note v. In *Commercial Bank v. Strong*, 28 Vt. 316, it was proved to be the duty of one clerk of a bank to fill out and direct notices, and to place them on his desk. It was also proved to be the duty of another clerk to take the notices, so left daily, to the post-office. The notice was proved to have been left in the usual place on a certain day, and afterwards on the same day had been removed. The clerk whose duty it was to carry letters to the post-office testified that his usual practice was to carry them promptly, but he could not swear that he had carried the notice in the case in suit. Held sufficient proof of notice. *Redfield*, C. J. criticises the propositions laid down in *Chitty on Bills*, — that it is incumbent upon the holder "to prove distinctly and by positive evidence that due notice was given, and that it cannot be left to inference or presumption"; and that "the party who puts a letter giving notice of the dishonor of a bill into the post-office must be able to swear to a certainty, and not doubtfully, that he put the letter in himself, and not that he was doubtful whether he did not deliver it to another clerk to put it in," — declaring them unsupported by the authorities referred to. In *Mount Vernon Bank v. Holden*, 2 R. I. 467, the notice was delivered to an assistant of the postmaster, in a room adjoining the office, such being the usage in that place. Held sufficient, although there was a delay in the transmission there. In *Hawkes v. Salter*, 4 Bing. 715, 1 Moore & P. 750, the holder's clerk, who copied the notice, said that it was put into the post-office, but could not recollect whether by himself or by another clerk. Held not sufficient evidence of its being deposited in the post-office.

(j) *Peirce v. Pendar*, 5 Met. 352; *Ireland v. Kip*, 10 Johns. 490, 11 id. 231. See *Smedes v. Utica Bank*, 20 id. 372; *Cayuga Co. Bank v. Bennett*, 5 Hill, 236; *Hyslop v. Jones*, 3 McLean, 96; *Shepard v. Haley*, 1 Conn. 367; *Manchester Bank v. Fellows*, 8 Foster, 302; *Green v. Darling*, 15 Maine, 141; *Davis v. Gowen*, 19 id. 447; *Kramer v. M'Dowell*, 8 Watts & S. 138; *Haly v. Brown*, 5 Penn. State, 178; *Bell v. Hagerstown Bank*, 7 Gill, 216; *Walters v. Brown*, 15 Md. 285; *Farmers', &c. Bank v. Butler*, 3 Littell, 498; *Clay v. Oakley*, 17 Mart. La. 137; *Miranda v. City Bank*, 6 La. 740; *Porter v. Boyle*, 8 id. 170; *Manadue v. Kitchen*, 3 Rob. La. 261; *Saul v. Brand*, 1 La. Ann. 95; *Curtis v. State Bank*, 6 Blackf. 312; *Costin v. Rankin*, 3 Jones, N. Car. 387; *Stephenson v. Primrose*, 8 Port. Ala. 155; *Foster v. McDonald*, 3 Ala. 34; *Brindley v. Barr*, 3 Harring. Del. 419; *Remington v. Harrington*, 8 Ohio, 507. But where there are two post-offices in the same town, and the notice would be transmitted from the one to the other, in the ordinary course, in order to reach the indorser, such a method of transmission is proper. *Ransom v. Mack*, 2 Hill, 587. See *Seneca Co. Bank v. Neass*, 5 Denio, 329, 3 Comst. 442. *Shaw*, C. J., *Peirce v. Pendar*, 5 Met. 352: The penny-post might be used in such case. See the cases of *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Brindley v. Barr*, 3 Harring. Del. 419; *Curtis v. State Bank*, 6 Blackf. 312; *Farmers', &c. Bank v. Butler*, 3 Littell, 498;

to one authority, if the party addressed duly receive the notice, or if the jury can properly presume from the facts of the case that it was received, the mere manner in which it was sent is wholly

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*Gist v. Lybrand*, 3 Ohio, 307; *Louisiana State Bank v. Rowel*, 18 Mart. La. 506; *Bell v. Hagerstown Bank*, 7 Gill, 216. In *Walters v. Brown*, 15 Md. 285, it was held, that where there was a penny-post, the mail might be used as a method of transmission, and that the same rule applied as to the risk in such cases as where the parties resided in different towns. Where the indorser and holder live in different towns, the notice may be deposited in the post-office of the town where the indorser lives. *Stamps v. Brown, Walker*, 526; *Gindrat v. Mechanics' Bank*, 7 Ala. 324; *Foster v. McDonald*, 8 id. 376, *Timms v. Delisle*, 5 Blackf. 447. *Contra*, *Patrick v. Beazley*, 6 How. Miss. 609; *Hogatt v. Bingham*, 7 id. 565; *M'Crummen v. M'Crummen*, 17 Mart. La. 158. In *Greene v. Farley*, 20 Ala. 322, it was held, that if the indorser and owner live in the same place, but the note is protested in another by a notary, the latter may still transmit notice to the indorser by mail. Where the parties live in different towns, but use the post-office in the same town, the mail may be used as a place of deposit for the notice. *Carson v. Bank of Alabama*, 4 Ala. 148; *Bank of Columbia v. Lawrence*, 1 Pct. 578; *Jones v. Lewis*, 8 Watts & S. 14; *Timms v. Delisle*, 5 Blackf. 447; *Bell v. State Bank*, 7 Blackf. 456; *Fisher v. State Bank*, id. 610; *Barret v. Evans*, 28 Misso. 331; *Foster v. Sineath*, 2 Rich. 338. *Contra*, *Laporte v. Landry*, 17 Mart. La. 359; *Louisiana State Bank v. Rowel*, 18 id. 506; *Pritchard v. Scott*, 19 id. 491; *Glenn v. Thistle*, 1 Rob. La. 572; *Harris v. Alexander*, 9 id. 151; *Farmers', &c. Bank v. Butler*, 3 Littell, 498. But these cases are now overruled. *New Orleans Canal, &c. Co. v. Barrow*, 2 La. Ann. 326; *Hepburn v. Ratliff*, id. 331; *Bird v. McCalop*, id. 351; *New Orleans, &c. R. Co. v. Patton*, id. 352; *Lathrop v. Delee*, 8 id. 170; *Bank of Louisiana v. Tournillon*, 9 id. 132; *Bondurant v. Everett*, 1 Met. Ky. 658. In *Hartford Bank v. Stedman*, 3 Conn. 489, a note was discounted at the Hartford Bank, and protested at Middletown, at a bank in which place it was payable. The notary in Middletown directed the notice to the indorser, leaving the place blank, and enclosed it to the Hartford Bank. The cashier of the latter bank inserted the word "Hartford," the indorser living there, and deposited the notice in the post-office. Held sufficient. So *Manchester Bank v. Fellows*, 8 Foster, 302; *Warren v. Gilman*, 17 Maine, 360; *Eagle Bank v. Hathaway*, 5 Met. 212. But in *Sheldon v. Benham*, 4 Hill, 129, the notary protested a note in the place where it was payable, and forwarded notices for all the indorsers residing at a different place to the fourth indorser. He deposited them in the post-office in the place where the indorsers lived. Held insufficient. If a note is payable at a bank in the same place where the indorser lives, notice to him cannot be deposited in the post-office. *Bowling v. Harrison*, 6 How. 248; *State Bank v. Slaughter*, 7 Blackf. 133. But in such case, a usage to deposit notices in the post-office will bind the parties to the note. *Chicopee Bank v. Eager*, 9 Met. 583; *Gindrat v. Mechanics' Bank*, 7 Ala. 324. See *Bank of U. S. v. Norwood*, 1 Harris & J. 423; *Bell v. Hagerstown Bank*, 7 Gill, 216. The usage should be clearly proved. Thus, in *Bowling v. Harrison*, 6 How. 248, there was a memorandum attached to the note, that "the third indorser, J. P. H., lives at Vicksburg." A usage of the banks in Vicksburg was proved, to the effect that personal notice was served on the indorsers living in that place, unless there was a memorandum on the note or bill designating the place to which the notice was to be sent. It was contended that the jury might be allowed to infer, from the facts of the case, that there was a usage in such cases as the one in suit to deposit notices in the post-office; but it was held that there was no evidence from which a jury would be justified in drawing such inference. But in *Wilcox*

immaterial.(*k*) But if sent by mail where both parties live in the same town, it would seem that the sender remains responsible for the due delivery of the notice. Although, however, the general rule may be considered as well settled, yet the decisions of our courts are by no means unanimous with regard to its application. One class of authorities, which adheres with much strictness to the rule, declares that the true principle by which each case is to be decided is this, — that the post-office is to be used as a means of *transmission* only, and not a place of deposit.(*l*) Other authorities, regretting that the rule was originally adopted, declare that it is too well settled to be overturned, but decide that its operation is not to be extended. The true test would, then, seem to be only the fact whether the holder and the party to whom the notice is to be sent reside in the same town or not.(*m*) Originally, perhaps, notice could never be sent through the post-office, and the first relaxation was to allow this method of communication where the parties resided in different towns.(*n*) We are aware of no good reason for any difference between our law and that of England, except that the English law is in that respect very much London law, and in that vast city the public arrangements for speedy delivery to everybody give peculiar weight to all the reasons which would induce a resort to the post-office anywhere. In this country, generally at least, a use of the post-office in the same town would imply a delay of a day, which may be avoided by employing a clerk or messenger.

It seems to be held in England, and for reasons which would probably be deemed sufficient in this country wherever they were applicable, that if there was a communication across the ocean by regular lines of packets, under steam or canvas, the vessels composing that line might be used, and a holder might delay a

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*v. M'Nutt*, 2 How. Miss. 776, it was held that a custom among the notaries of a particular city to deposit notice in the post-office for an indorser could not make the practice lawful. Changed in New York by statute in 1857. The usage should be certain and clear. *Thorn v. Rice*, 15 Maine, 263.

(*k*) *Hyslop v. Jones*, 3 McLean, 96. See *Hill v. Crary*, id. 582; *Foster v. McDonald*, 5 Ala. 376; *Bradley v. Davis*, 26 Maine, 45; *Bank of U. S. v. Corcoran*, 2 Pet. 121; *Manchester Bank v. Fellows*, 8 Foster, 302; *Whiteford v. Burckmyer*, 1 Gill, 127.

(*l*) *Bronson, J., Ransom v. Mack*, 2 Hill, 587; *Farmers', &c. Bank v. Battle*, 4 Humph. 86.

(*m*) *Shaw, C. J., Eagle Bank v. Hathaway*, 5 Met. 212.

(*n*) *Bronson, J., Ransom v. Mack*, 2 Hill, 587.

reasonable time for the next regular ship; and the fact that a casual ship which might have taken the notice sailed sooner and arrived sooner would not vitiate the notice.(o) If the delay caused in this way were very great, and the probability of this should have been anticipated, as if the holder delayed a fortnight for a regular sailing packet, and a casual but safe steamer departed in a day or two, such delay would no doubt be considered unreasonable, and therefore inexcusable.

The postmark on a letter is *prima facie* evidence that the letter was deposited in the office on that day, but is open to rebutter.(p)

Curious questions have arisen as to the address. If, for instance, the sender has no better means of knowing how to address a drawer than by his name as written by himself on the bill, and through an error caused by the indistinctness of the writing the notice does not reach the drawer in season, the drawer is not discharged.(q) Nor should we say, although on

(o) *Mulman v. D'Eguino*, 2 H. Bl. 565. The head note in *Fleming v. M'Clure*, 1 Brev. 428, is, that "where a bill drawn in this country on Europe has been dishonored, notice must be sent by the first ship bound to any port of the United States; and it is not sufficient to send it by the first ship for the port where the drawer and indorser resides." This is neither law nor the decision of the court. All that was decided was this: A bill was drawn in Charleston on London. The notice was not received until four months after the dishonor of the note. The judge left it to the jury to say, from the circumstances of the case, whether the notice might not have been sent earlier, and said that "it would be doing violence to presumption," to suppose that it might not have been sent before. His charge was held correct. All that the case really decides is, that a party in London cannot wait three months in order to send a notice by ship direct to Charleston, when he may be supposed to have had chances to forward it by vessel to some other port. If the head note correctly states the law, then the holder might be obliged to forward a notice to Portland, by a vessel for New Orleans, although it might be sent to Portland direct by a vessel which sails for the latter place a day or two subsequently to the former vessel.

(p) *Crawford v. Branch Bank*, 7 Ala. 205, where it was also held that the postmark was not evidence of itself, but might be proved by the person who stamped it, or by any one in the habit of receiving letters from that office. *Sed quære*. See *Abbey v. Lill*, 5 Bing. 299. But see *Woodcock v. Houldsworth*, 16 M. & W. 124. In *Stocken v. Collins*, 9 Car. & P. 653, the postmark of a letter denoted that it was put in on April 29, at 10 A. M. A witness stated that it was put in on April 28, before 1 P. M. The judge charged the jury to find for the plaintiff, if they should find the letter to have been deposited at the time the witness stated; and to find for the defendant, if it was deposited at the time the postmark denoted. The jury found for the plaintiff, and a motion for leave to enter a nonsuit was overruled.

(q) *Hewitt v. Thompson*, 1 Moody & R. 543. It will be seen hereafter, that if a person use due diligence to discover the address of a drawer or indorser, and

this point we have no authority, that the indorsers would be discharged, for the case seems to come under the rule of impossibility, as the holder has done all that he could do.

Where a notice to an indorser was mailed in London, addressed to "Mr. Haynes, Bristol," Abbott, C. J. ruled that it did not raise the presumption of delivery, and required some proof of the reception of the notice by the defendant, on the ground that, as the place was very populous, there might be many persons there of the same name.<sup>(r)</sup> If, however, all the information which the drawer has is given by the signature, and all this information is made use of by the holder, it is certainly evidence from which a jury may infer due notice to him,<sup>(s)</sup> or at least that the holder has done all that he could. In this country, a letter in which a notice is sent should be directed to the proper town and State, and an omission as to the latter has been held to invalidate the notice.<sup>(t)</sup>

It may be expected that questions will arise on this subject before long, by reason of the recently invented and already generally used magnetic telegraph. We have, however, no knowledge of its being used for purposes of this kind, or of any supposition by merchants or lawyers that it is the necessary or proper instrument for giving such notice. We shall not attempt to anticipate either these questions or the answers to them, further than to remark, that if a message were duly sent by telegraph,

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still misdirect the letter, the notice will be good. See *Siggers v. Brown*, 1 Moody & R. 520.

<sup>(r)</sup> *Walter v. Haynes*, Ryan & M. 149. In *Jones v. Wardell*, 6 Watts & S. 399, a notice in a letter was directed to "Wm. D. Jones, Philadelphia, Pa." The letter was taken out of the post-office by another person of the same name with the indorser. The indorser received it after a few days' delay. Held, that this delay did not discharge him. See *Lawrence v. Miller*, 16 N. Y. 235; *True v. Collins*, 3 Allen, 438.

<sup>(s)</sup> In *Mann v. Moors*, Ryan & M. 249, the drawer dated the bill "Manchester." The fact that a notice was sent, addressed to "Mr. Moors, Manchester," was held evidence by which a jury might find that he had received due notice. The jury found for the plaintiff. The same has been held, where the drawer dated the bill at London. *Clarke v. Sharpe*, 3 M. & W. 166; *Burmester v. Barron*, 17 Q. B. 828. In this last case there was evidence that the drawer never received the notice. The jury found for the plaintiff, and a rule to enter a nonsuit, on a verdict for the defendant, was refused. It was also held here, that the fact that the residence of the acceptor was stated in the acceptance, and that inquiries might have been made of him by which the residence of the drawer might have been ascertained, did not render the notice insufficient.

<sup>(t)</sup> *Beckwith v. Smith*, 22 Maine, 125, where the letter was directed to Calais. It was proved that there was a Calais, Me. and a Calais, Vt.

and duly delivered, it would no doubt be deemed sufficient; and if the importance of giving early information of the dishonor of negotiable paper should induce our merchants to apply the telegraph to this purpose, a usage may grow up which would gradually acquire the force of law. At present, no such usage is known to exist. A question may arise in other cases of notice as well as in that now under consideration, in which a party who is entitled to the earliest information of an important fact, from a delay in giving this information suffers actual damage; and this may cause an inquiry whether the informing party discharged the whole of his duty. And if he made use of the mail, which required a delay of many days, when a means of telegraphic communication was open to him for which as many minutes sufficed, and one which is found to be reasonably safe and trustworthy, and which does not at all interfere with a resort to the mail also, the question may arise whether it was not his duty to make use of this more rapid means, or, on the other hand, whether it would not be competent for him to say, that he had no confidence in new things, but preferred "*ire per antiquas vias.*" But this question must depend for its answer in each case upon its peculiar circumstances and merits, as well as upon the usages which may grow up.

### SECTION III.

#### TO WHAT PLACE THE NOTICE SHOULD BE SENT.

THE place of business, if the notice is sent by a clerk or messenger, is the proper place as well as the usual one; (u) and it has

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(u) There seems to be some uncertainty as to the proper statement of the rule. Thus, in the following cases it is laid down that, where the parties live in the same place, notice must be served personally, or at the indorser's residence, or at his place of business. *Bank of Columbia v. Lawrence*, 1 Pet. 578, 583; *Williams v. Bank of U. S.*, 2 id. 96, 101; *Hyslop v. Jones*, 3 McLean, 96; *Eagle Bank v. Hathaway*, 5 Met. 212; *Peirce v. Pendar*, id. 352; *Ireland v. Kip*, 11 Johns. 231; *Green v. Darling*, 15 Maine, 139; *Kramer v. M'Dowell*, 8 Watts & S. 138; *Haly v. Brown*, 5 Penn. State, 178; *Brindley v. Barr*, 3 Harring. Del. 419; *Curtis v. State Bank*, 6 Blackf. 312; *Stephenson v. Primrose*, 8 Port. Ala. 155; *Phillips v. Alderson*, 5 Humph. 403; *Wilcox v. M'Nutt*, 2 How. Miss. 776; *Manadue v. Kitchen*, 3 Rob. La. 261; *Saul v. Brand*, 1 La. Ann. 95. In the following cases it is said that the notice should be served personally, or at the indorser's residence. *U. S. v. Barker*, 4 Wash. C. C. 464,



even been said, that it is the duty of the person notified to have some one to attend to such matters at his place of business; (*v*) and therefore, if notice is sent in that way, and no person is found at the place of business, it is a sufficient notice. (*w*) But this may be doubted; and we should not think it always safe to rely upon such notice. Even demand may be made, as we

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470; Ireland *v.* Kip, 10 Johns. 490; Smedes *v.* Utica Bank, 20 id. 372, 392. So in Commercial Bank *v.* Strong, 28 Vt. 316, Redfield, C. J. said: "The general course of decision is, certainly, that notice to the indorser must be sent to the place of his residence, unless he is shown to have his place of business elsewhere." In Shepard *v.* Hall, 1 Conn. 329, Swift, C. J. said: "Where the parties live in the same town, personal notice of the non-payment of bills and notes must be given." A personal notice is good wherever it may be served. Hyslop *v.* Jones, 3 McLean, 96. In Van Vechten *v.* Pruyn, 3 Kern. 549, 552, Comstock, J. said that the true rule was, that "when the service is not by mail, notice may be left indifferently at the indorser's dwelling or place of business." In this case the indorser and holder lived in the same town. The indorser spent three days in the week there, and the remaining four in the city of New York, where he transacted his business and usually received his papers and letters. Held, that a notice sent by mail to the latter place was insufficient, without proof that the notice was received. *See quere.*

(*r*) Lord Ellenborough, Crosse *v.* Smith, 1 Maule & S. 545; Lord Eldon, in Goldsmith *v.* Bland, cited id. 554, left it with the jury to say whether the indorser should have a person there. In Granite Bank *v.* Ayers, 16 Pick. 392. Shaw, C. J. said: "Now though a man is out of town, yet if he has a domicil or place of business, it is to be presumed that he will leave some person charged with the care of his business, or at least some one between whom and himself there is a privity or confidence. It is upon this principle that all notices at one's domicil, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed, in law, to be good constructive notice, and to have the legal effect of actual notice." So in Jones *v.* Mansker, 15 La. 51, 54, Morphy, J. said: If the indorser has left no one there to attend to his affairs, it is his loss, and the holder of the note or bill has done his duty, and all that the law demands of him. Notice left with a clerk at the indorser's office, in the absence of the latter, is sufficient. Edson *v.* Jacobs, 14 La. 494; Jones *v.* Mansker, 15 id. 51; Commercial Bank *v.* Gove, id. 113.

(*w*) Crosse *v.* Smith, 1 Maule & S. 545; Goldsmith *v.* Bland, id. 554; Bancroft *v.* Hall, Holt, N. P. 476; State Bank *v.* Hennen, 16 Mart. La. 226; Miller *v.* Hennen, 15 id. 587. See Granite Bank *v.* Ayers, 16 Pick. 392. See Allen *v.* Edmundson, 2 Exch. 719, where it was held that the fact that the counting-room of the indorser was closed should have been pleaded as a dispensation of notice, and that it did not support an allegation of due notice. Notice left with a clerk at the indorser's place of business, in the absence of the latter, is sufficient. Edson *v.* Jacobs, 14 La. 494; Jones *v.* Mansker, 15 id. 51; Commercial Bank *v.* Gove, id. 113. So notice left at the indorser's store, there being no proof as to the person with whom it was left, is sufficient. Bank of Louisiana *v.* Mansker, id. 115. Notice left with a black man at the indorser's office is sufficient. Bank of U. S. *v.* Merle, 2 Rob. La. 117. Notice left at the indorser's counting-room, with a person who declared himself to be the indorser's agent, is sufficient, and proof that the person with whom it was left was not an agent of the indorser is irrelevant, the notice having been left at the right place. Jacobs *v.* Town, 2 La. Ann. 964. ▲



have seen,(x) at the residence of a payor, although it cannot be supposed to be usual, in the course of business, for a maker or acceptor to keep his funds or his books at his house. No such objection, nor any other, lies against giving notice of dishonor at one's residence; and this we think should be done, if no one is found at the place of business.(y) But

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notary's certificate of notice to an indorser by "a letter delivered to his bar-keeper, he not being in, is insufficient, because it does not mention the place of delivery; but the defect may be cured by evidence. *Saul v. Brand*, 1 La. Ann. 95. Notice left with a mate on board a brig commanded by an indorser is enough. *Austin v. Latham*, 19 La. 88. In *Ogden v. Cowley*, 2 Johns. 274, the notary called at the house of an indorser, and finding it shut, on inquiry learned that he had gone out of town. The yellow fever was prevailing there to some extent. The notary deposited the notice in the post-office. Held sufficient. A notice left at the office of the indorser, with a person there, was held sufficient. *Lord v. Appleton*, 15 Maine, 270, where it is also said that, if it had been simply left there, in the absence of any person to receive it, it would have been sufficient. In *Miles v. Hall*, 12 Smedes & M. 332, the notary went to the bed-side of the indorser, who was sick, with the notice, and said he had protested a note, but could not say that the indorser heard him. He then left the notice on the mantel-piece. Held sufficient.

(x) *Supra*, p. 422, note m. So a notice left at the dwelling-house of an indorser is sufficient. *Franklin v. Verbois*, 6 La. 727; *Coulon v. Champlin*, 15 id. 544. A notary's certificate that he left the notice at the domicil of the indorser is sufficient, as it is unnecessary to show a delivery to any one there, or that he simply left it, as either is enough. *Manadue v. Kitchen*, 3 Rob. La. 261. Notice delivered to a black man, who seemed to be a servant of the indorser's family, standing before the indorser's house early in the morning, before the door was opened, and who said that the family were not up, was held insufficient, defendant proving that the black man was not connected in any way with the family. *Dufour v. Morse*, 9 La. 333.

(y) But in *Crosse v. Smith*, 1 Maule & S. 545, it appeared that the drawer, to whose counting-room a person was sent to give notice of the dishonor of the bill, resided but a short distance from the counting-room; and in the other cases cited *supra*, note w, no mention is made of any demand at the residence, or any suggestion of its necessity or propriety. In *Bank of Columbia v. Lawrence*, 1 Pet. 578, it was held, that the fact that an indorser occupied a room in another's house for settling up his former business, and where he kept his books of account, and his newspapers and foreign letters were left, did not make this his "place of business." In *Stephenson v. Primrose*, 8 Port. Ala. 155, it was held, that a room where a man is accustomed to resort, but where he is not shown to carry on any regular trade or employment, is not his place of business. In *Commercial Bank v. Strong*, 28 Vt. 316, it was held, that the office of a railroad corporation of which the indorser was president was not his place of business. A notice left at the post-office of which the party notified was postmaster was held sufficient. *Cook v. Renick*, 19 Ill. 598. In *Granite Bank v. Ayers*, 16 Pick. 392, a notice was left on the counter of the shop of a stranger, who told the notary that the indorser's place of business was behind the shop, that the indorser was absent from town, and promised to give him the notice when he returned. It seems that this was insufficient. In *Chouteau v. Webster*, 6 Met. 1, the notice was sent to Washington to the defendant, a Senator in Congress. Held sufficient, although his permanent place of residence was

it may, perhaps, be sent to either, if both are in the same town. (z)

Here, as in the case of demand, the holder must do what he can, but is excused by an impossibility. If he does not know where the indorser lives, but can acquaint himself with it by reasonable endeavors, he must do so. (a) Thus it is not enough to

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elsewhere, and although he had an agent who had charge of his business matters in another place. So also *Tunstall v. Walker*, 2 Smedes & M. 638, overruling 3 How. Miss. 259. In *Marr v. Johnson*, 9 Yerg. 1, notice sent to the residence of a member of Congress, who was in Washington at the time, was held sufficient. In *Hill v. Norvell*, 3 McLean, 583, a notice to an indorser, a member of the Senate or House of Representatives in Washington, left at the post-office of the Senate or House, Congress then being in session, was held insufficient. In *Bank of U. S. v. Lane*, 3 Hawks, 453, the notice was sent to the shire town. The indorser was high sheriff of the county, and at the time was in attendance at the court. Held sufficient, although not sent to the place where he lived, or to his usual post-office.

(z) *Williams v. Bank of U. S.*, 2 Pet. 96, 101. So where they are in different towns. *Bank of Geneva v. Howlett*, 4 Wend. 328; *Downer v. Remer*, 21 id. 10. A note was payable at a bank in the town of A., where the indorser got his letters. The notice was sent to an adjoining town, where he lived. Held sufficient, it not appearing that the party sending the notice knew that the indorser usually received his letters at A. *Seneca Co. Bank v. Neass*, 3 Comst. 442, 5 Denio, 329. Where an indorser lived in one village, and occasionally got his letters there, but transacted his business in another town, where he received most of his letters, a notice sent to the latter place was held sufficient. *Montgomery Co. Bank v. Marsh*, 3 Seld. 481. In *Runyon v. Mountfort*, Busbee, 371, the indorser had lived in Onslow. Some years before the maturity of the bill, he purchased a house and lot in Newbern, and afterwards lived in the former place from October till June, and in the latter the rest of the year. His letters were received in Onslow. The notice was sent to Newbern in April. Held, that Newbern was not the proper place to which the notice should be sent. But in *Stewart v. Eden*, 2 Caines, 121, where the indorser resided part of the year in New York, and spent the summer in the country, a few miles from that city, a notice put into the keyhole of the door of the house in New York was held sufficient. And in *Exchange, &c. Co. v. Boyce*, 3 Rob. La. 307, it was held, that where a person lives part of the year in one place and part in another, notice may be sent to either. Where the indorser has two or more places of business in the same town, the holder may send the notice to either. *Phillips v. Alderson*, 5 Humph. 403; *Redfield, C. J., Commercial Bank v. Strong*, 28 Vt. 316, 320.

(a) *Harris v. Robinson*, 4 How. 336; *Burmester v. Barron*, 17 Q. B. 828; *Lambert v. Ghiselin*, 9 How. 552; *Chapcott v. Curlewis*, 2 Moody & R. 484; *Carroll v. Upton*, 3 Comst. 272, 2 Sandf. 171; *Rawdon v. Redfield*, 2 Sandf. 178; *Spencer v. Bank of Salina*, 3 Hill, 520; *Bank of Utica v. De Mott*, 13 Johns. 432; *Bank of Utica v. Bender*, 21 Wend. 643; *Belden v. Lamb*, 17 Conn. 441; *Hill v. Varrell*, 3 Greenl. 233; *Haly v. Brown*, 5 Penn. State, 178; *Smith v. Fisher*, 24 id. 222; *Runyon v. Mountfort*, Busbee, 371; *Nichol v. Bate*, 7 Yerg. 305; *M'Murtrie v. Jones*, 3 Wash. C. C. 206. As to what constitutes due diligence, it is extremely difficult, if not impossible, to lay down any general rules applicable to all cases, inasmuch as each one is dependent to a great degree on its own special circumstances. In *Rawdon v. Redfield*, 2 Sandf. 178, the

address notice by mail to a drawer, at the place where the bill is drawn, without some inquiry, if any is practicable, to ascertain

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general doctrine is laid down, that if the notary inquire of persons who, from their connection with the transaction, are likely to know where the indorser resides, and are not interested to mislead the notary, and he acts on information thus obtained, it is exercising due diligence. In the case itself, the inquiries were made of the acceptor and holder, and were considered sufficient. In *Harris v. Robinson*, 4 How. 336, it was held that there was no absolute obligation incumbent on the notary to inquire of the holder of the note where the indorser lived. *McLean*, J. dissenting, on the ground that, if such were the law, a holder who is presumed to know where the indorser resides might evade the law with respect to demand and notice by employing an agent who does not possess such knowledge. "It is a new principle in the law of agency, that the knowledge of the principal shall not affect him, provided he can employ an agent who has no knowledge of the subject." The circumstances of the case showed, in the opinion of *McLean*, J., that the holder knew where the indorser resided. In *Smith v. Fisher*, 24 Penn. State, 222, *Haly v. Brown*, 5 id. 178, the notices were held insufficient, principally because the holder and owner had not given any information to the notary as to the place where the indorser lived. So in *Hill v. Varrell*, 3 Greenl. 233, it is held that inquiry should be made of the parties to the note; the only inquiry made was of one indorser, and the notice was held insufficient. And in *Lawrence v. Miller*, 16 N. Y. 235, it was held that the holder is presumed in law to know where his immediate indorser lives, and is bound to communicate his information to any agent employed to give notice; and where this had not been done, and the notary left the notice at the place of business of a stranger of the same name with the indorser, the latter was discharged. In *Preston v. Daysson*, 7 La. 714, *Bullard*, J. said: "It is true the holder of the paper ought not to avail himself of the ignorance of the notary as to the residence of the indorser, but there is no evidence to show that the holder knew where she resided." In this case the notary certified that he had used due diligence. The evidence was, that he sent his clerk to the store of the drawer, and of the payee and indorser, and could not obtain any information. The indorser received notice some days after the maturity of the note, and was held. In *Fitler v. Morris*, 6 Whart. 406, the holder knew where the drawers lived, but the notary who sent the notice did not. The notice went to the wrong place, and the drawers were discharged. See *Paterson Bank v. Butler*, 7 Halst. 268. In *Lambert v. Ghiselin*, 9 How. 552, the inquiries were made of a person trading at a particular place, who said that the indorser lived in the same place with him. Held sufficient. It was also held, that if due diligence was used in sending the notice, it was not necessary to send a further one, if the holder should subsequently find out the actual residence of the indorser, and that it was at a different place from the one to which the first notice had been sent. In *Chapman v. Lipscombe*, 1 Johns. 294, a bill was dated at, and accepted in, New York. Inquiries were made at the banks of that place, and from information thus acquired notice was sent, though to the wrong place. Held sufficient. In *Bank of Utica v. De Mott*, 13 Johns. 432, the book-keeper of the bank where the note was inquired of the cashier and directors, and of others whom he supposed likely to know. The notice was sent to the wrong place. The indorser had lived more than ten years previously at his place of residence. Held insufficient. In *Bank of Utica v. Bender*, 21 Wend. 643, inquiry of the drawer for the residence of his accommodation indorser, and acting on information so acquired, was held sufficient, though the notice was sent to the wrong place. So in *Ransom v. Mack*, 2 Hill, 587, where the inquiry was made of the second indorser. In *Spencer v. Bank of Salina*, 3 id. 526, the notary testified that he inquired of several persons in a bar-room of a hotel,

whether the drawer lives there.(b) But if he can learn no more,

and of other persons whom he met in the street, and at the post-office. Held, that due diligence had not been used. *Bronson, J.* said that he ought to have gone among business men. "If he had been told by some credible person who would be likely to know the fact, he might have acted upon that information without pushing his inquiries further. But until some one is found who professes to be able to give the required information, it will not do to stop short of a thorough inquiry at places of public resort and among such persons as would be most likely to know the residence of the indorser." In *Belden v. Lamb*, 17 Conn. 441, the cashier of a bank where a note was payable went out of the bank the day the note matured to find where the indorser lived, and on his return directed the notice to be sent to Chicopee. The note was payable at another bank near by, and the indorser had received notices within a few months previous from that bank and from others in the same place. The holder of the note did not know where the indorser lived. Held sufficient evidence from which a jury might infer that proper inquiries had been made at the other banks, and that due diligence had been used. *Williams, C. J.* and *Storrs, J.* dissenting. Inquiry by the notary of the officers of a bank where the note was to be discounted was held not to be using due diligence, in *Stuckert v. Anderson*, 3 Whart. 11. In *Sturges v. Derrick*, Wightw. 76, the holder inquired of the maker's son where the indorser lived, and could get no information. Held, due diligence. But in *Beveridge v. Burgis*, 3 Camp. 262, Lord *Ellenborough* nonsuited the plaintiff in a case where the only inquiries made were at the place where the acceptance was payable. Where no inquiry is made of the maker or his syndic, or of a person of the same surname with the indorser, but the initial letter of whose first name is differently printed in the city directory, sufficient diligence is not used. *Vance v. Depass*, 2 La. Ann. 16. Where an indorser, formerly a shipping-master, had kept no office for some years, though still engaged in business, and, his name not being found in the directory, the notary went to that quarter of the city where his office had been, and inquired at a shipping-office, the clerk of which said that the indorser formerly stayed there, but had left, and it was not known where he had gone; and the notary, after inquiring at the sailor boarding-houses in the neighborhood and elsewhere without success, deposited the notice in the post-office of the city where the indorser resided, it was held sufficient. *Peet v. Zanders*, 6 La. Ann. 364. In *Brighton Market Bank v. Philbrick*, 40 N. H. 506, where the holder of a dishonored note, not knowing the residence or business address of the indorser, went to the principal hotel in the village where the indorser was accustomed to do business, — that at which men of the same occupation as the indorser usually stopped, — to the keepers of which the indorser was well known, and from the direction of which the holder had noticed the indorser coming to his own place of business, and upon inquiring there, was distinctly informed that the indorser resided in a particular town, whereupon he, in good faith, seasonably forwarded notice of the dishonor to the indorser at that town, it was held that he had exercised due diligence.

(b) The law is so stated in the following cases; but in all it appeared that the drawer lived in a different place from that to which the notice was sent. *Carroll v. Upton*, 3 Comst. 272; *Lowery v. Scott*, 24 Wend. 358; *Foard v. Johnson*, 2 Ala. 565; *Hill v. Varrell*, 3 Greenl. 233; *Barnwell v. Mitchell*, 3 Conn. 101, where it also appeared that no inquiry had been made of the acceptor, who knew where the drawer lived; *Fisher v. Evans*, 5 Binn. 541, but in this case no notice was sent. In *Pierce v. Struthers*, 27 Penn. State, 249, an opinion was expressed, to the effect that sending the notice to the drawer at the place where the bill was dated was *prima facie* sufficient; and if it should be shown that he lived elsewhere, then due diligence to ascertain his place of residence

a letter should be so sent.(c) Or if the party to be notified is travelling, or is absent from home for any reason, and his present address is known to the holder, or if his absence from home is known, and the holder has any means of learning his address, or of ascertaining whom he has left behind to attend to his business, it might perhaps be his duty (but we cannot say this on authority) to send notice accordingly. But if a party leaves home without taking usual and proper precautions to facilitate sending business communications to him, undoubtedly this is his fault, and he can relieve himself from no responsibility by such fault, and will be held to all parties as if duly notified, provided due efforts were made.(d) If one about to be absent directs that

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should be used. In *Robinson v. Hamilton*, 4 Stew. & P. 91, the same appears to have been held. See also *Dickins v. Beal*, 10 Pet. 572. But this would not probably apply to the case of an indorser, because it is difficult to see how there can be any presumption that he lived where the note or bill is made or drawn. *Denny v. Palmer*, 5 Ired. 610; *Runyon v. Montfort*, Buſbee, 371; *Branch Bank v. Peirce*, 3 Ala. 321; *Spencer v. Bank of Salina*, 3 Hill, 520. In *Wood v. Corl*, 4 Met 203, the note was dated at Buffalo. Notice was sent to the indorser at that place, and the notary testified that it was reported that he lived there. The defendant, the indorser, contended that the plaintiff should be required to prove, either that he lived there, or that due diligence had been used. But the court held the evidence sufficient. In *Page v. Prentice*, 5 B. Mon. 7, a bill was dated at Louisville, and notice to the indorser was sent there. Process had been served upon him in the county in which Louisville is situated. Held sufficient, in the absence of proof that he resided elsewhere. In *Moodie v. Morrall*, 3 Const. R. 367, the note was made and payable in Charleston. The maker lived there, and the indorser, when there, resided in the same house. Payment was demanded of the indorser's wife, who said that both were absent, and a notice was left there for the indorser. Held sufficient to charge him. In *Sasscer v. Whitely*, 10 Md. 98, *Le Grand*, C.J. said: "In the absence of knowledge of the holder, to be shown in proof, the place of the date of the note is to be taken as the place of residence of the maker and indorser." If the holder does not know where the indorser lives, and cannot ascertain it by due diligence, it will be sufficient to send the notice to the place where the note or bill is dated. *Godley v. Goodloe*, 6 Smedes & M. 255; *Branch Bank v. Peirce*, 3 Ala. 321; *Bank of Utica v. Davidson*, 5 Wend. 587; *Sasscer v. Whitely*, 10 Md. 98.

(c) See the cases cited *supra*, note b. It may be doubted, however, whether this is necessary, since where the place of residence cannot be ascertained, after due diligence has been used, no notice at all is necessary. *Baldwin*, J., *Dickins v. Beal*, 10 Pet. 572, 580; *Hoopes v. Newman*, 2 Smedes & M. 71, 79; *M'Lanahan v. Brandon*, 13 Mart. La. 321; *Robinson v. Hamilton*, 4 Stew. & P. 91. But in *Phipps v. Chase*, 6 Met. 191, *Shaw*, C. J. said, that if the actual place of residence of a party could not be ascertained, notice should be given at his last place of abode.

(d) Where the holder is temporarily absent, notice should be left at his last place of abode or of business. *Curtis v. State Bank*, 6 Blackf. 312; *Wilcox v. M'Nutt*, 2 How. Miss. 776; *Moodie v. Morrall*, 3 Const. R. 367, *supra*, note b. Notice left with the wife of the indorser, in his absence, is sufficient. *Blakely v. Grant*, 6 Mass. 386; *Fisher v. Evans*, 5 Binn. 542; *Cromwell v. Hynson*, 2 Esp. 511; *Houseto v. Cowne*, 2

notice should be sent to him at a certain distant place, notice so sent to him, and from him to prior parties, will bind both him and the prior parties, although it would have reached him and

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M. & W. 348. Notice left with a fellow-boarder, at a private boarding-house where the indorser lodged, in his absence, is sufficient. *Bank of U. S. v. Hatch*, 6 Pet. 250, 1 McLean. 90; *M' Murtrie v. Jones*, 3 Wash. C. C. 206. In *Ashley v. Gunton*, 15 Ark. 415, the notary left the notice at the hotel where the indorser resided, addressed to him. It did not appear whether the indorser was at the hotel at the time, or the notary inquired for him, or left the notice with any person for him. Held insufficient. So in *Rives v. Parmley*, 18 Ala. 256, *Coster v. Thomason*, 19 id. 717, where the only testimony was the notary's certificate that the notices were left at the office of the indorser. But *Curry v. Bank of Mobile*, 8 Port. Ala. 360, seems *contra*. In *Bradley v. Davis*, 26 Maine, 45, the notice was left with the bar-keeper of a hotel, for a guest. It was testified that letters so left were put into an urn, and sent up to the guests' rooms within a short time after their reception. The court thought this sufficient. So *Dana v. Kemble*, 19 Pick. 112. In *Howe v. Bradley*, 19 Maine, 31, the indorser occupied a room in a public house. The notary went to the house, and learning that he was absent, left a notice at the door for him. It was proved that his room was locked. Held sufficient. See *Lord v. Appleton*, 15 Maine, 270; *supra*, p. 489, note *w*. In *McClain v. Waters*, 9 Dana, 55, it was held, that when the indorser or drawer is a transitory person, without any fixed place of residence, notice may be sent directed to the place where he usually resorts. In *Tunstall v. Walker*, 2 Smedes & M. 638, it is said that no notice at all is necessary in such case. In case of a permanent removal between the making and maturity of a note, it is laid down in some cases that the holder must use reasonable efforts to ascertain the new place of residence, and give notice there. *Phipps v. Chase*, 6 Met. 491; *Barker v. Clark*, 20 Maine, 156. But in others the doctrine is held, that the presumption is that the indorser continues to reside where he did when he indorsed the note, and that a notice sent there is sufficient, unless the holder knew, or ought to have known, of his removal. *Bank of Utica v. Phillips*, 3 Wend. 408, where *Marcy, J.* said: "It appears to me that the question of diligence cannot arise except in cases where the party knows, or ought to know, that there is occasion for its exercise. Ought the holders of this note, when it fell due, to have known that between its discount and maturity the indorser had changed his residence? They had no reason to expect such an event, and of course no considerations of diligence could have prompted them to institute any inquiry in relation to it. Where the place of an indorser's residence is established at the time when a note, having the usual time of bankable paper to run, is discounted, and is at such a distance from the place of payment as to repel the presumption that a removal, in case it happens before the note falls due, would come to the knowledge of the holders, and no actual knowledge is brought home to them, a notice of demand and non-payment directed to such place of residence is sufficient, although the indorsee has, in fact, in the mean time become a resident of another place." The same was held in *Harris v. Memphis Bank*, 4 Humph. 519. In *Farmers', &c. Bank v. Harris*, 2 Humph. 311, the judge charged the jury, that where the places of residence of the holder and indorser were near to each other, and communication frequent, the holder would, in legal contemplation, be presumed to know of the removal. Held incorrect, as it is a matter of fact and not of law. In *Planters' Bank v. Bradford*, 4 Humph. 39, where the removal was made under circumstances of particular notoriety, the notice sent to the former place of residence was held insufficient. In *Winans v. Davis*, 3 Harrison, 276, there



them much sooner if sent to his residence.(e) And if a foreigner in going away tells the holder where he is going, his absence is no excuse for non-notice, because it should be sent to the place he pointed out.(f) If a drawer or indorser hold himself out to the public as a resident of any town, and thereby deceive the holder, inducing him to send the notice there, the notice so sent will be binding, although the indorser live elsewhere.(g) In such case he would be estopped from denying the validity of the notice on the ground that it was sent to the wrong place.

The general rule applicable to all cases is, that the party should send the notice to that place where it would most probably find the party to be notified most promptly, either in fact or according to the best information he possessed or could obtain by the reasonable use of such means as were within his power.(h)

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were inquiries made by the holder which would have justified him in sending the notice to the former place. So in *Bank of Utica v. Davidson*, 5 Wend. 587. In *Dunlap v. Thompson*, 5 Yerg. 67, notice sent to the place from which the indorser had removed was held sufficient. So also *Hunt v. Fish*, 4 Barb. 324; *McGrew v. Toulmin*, 2 Stew. & P. 428, 436.

(e) *Shelton v. Braithwaite*, 8 M. & W. 252. Where the place is mentioned in the indorsement, it is to be considered as a part thereof, and notice sent there is sufficient. *Morris v. Husson*, 4 Sandf. 93; *Carter v. Union Bank*, 7 Humph. 548; *Farmers' &c. Bank v. Battle*, 4 id. 86; *Baker v. Morris*, 25 Barb. 138. In the last case the indorser wrote after his name the words, "Auburn P. O." Held, that a notice deposited there was good, although all the parties lived in the same town. So notices may be sent to any place where the indorser directs them to be left, although he may have a place of residence or of business elsewhere. *Eastern Bank v. Brown*, 17 Maine, 356. See *Bank of U. S. v. Corcoran*, 2 Pet. 121, 131. Although there may be post-offices nearer to the place where he lives. *Crowley v. Barry*, 4 Gill, 194; *Bell v. Hagerstown Bank*, 7 id. 216; *Bank of Columbia v. Magruder*, 6 Harris & J. 172; *Cormena v. Bank of Louisiana*, 1 La. Ann. 369.

(f) See *Hodges v. Galt*, 8 Pick. 251.

(g) *Lewiston Falls Bank v. Leonard*, 43 Maine, 144. In this case the indorser was the president of a bank in Hallowell, from some time prior to making the note till after its maturity, but his actual place of residence was in New York. By a statute of Maine, no one but a resident of that State was eligible to the office of director of a bank. The indorser had a box in the post-office in Hallowell, and his daughter was in the habit of taking his letters and forwarding them to him. She testified to having received the notice in question, but said she never sent it to her father. The indorser was held.

(h) In *Chouteau v. Webster*, 6 Met. 1, 7, *Shaw*, C. J. said: "It is conformable to the more general rule, sustained by many authorities, that notice shall be so given, and at such place, that it will be most likely to reach the indorser promptly. *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Bank of U. S. v. Carneal*, 2 id. 543." For the inquiries which should be made, see the cases cited *supra*, p. 490, note a. In *Bank of Utica v. Bender*, 21 Wend. 643, the bill was dated at C., and under the defendant's name as



If it be sent where the drawer did actually reside, his absence from home or his removal does not vitiate the notice, unless such removal was known, or should have been known, to the sender.(i)

If it actually reaches the party to be notified in due season, it is altogether immaterial to what place it was sent.(j)

We have already seen (k) that, in cases where the mail may legally be used for the purpose of transmitting notices of dishonor, the sender is not responsible for any failure in their transmission. Consequently, under such circumstances, putting a notice to an indorser or a drawer in the post-office, properly directed to him at the place where he lives, is considered generally as using due diligence.(l) Where there are two or more post-offices in the

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indorser was written "C.," and notice was sent to the defendant by mail to C. *Bronson*, J. said: "It is not absolutely necessary that notice should be brought home to the indorser, nor even that it should be directed to the place of his residence. It is enough that the holder of a bill makes diligent inquiry for the indorser, and acts upon the best information he is able to procure. If after doing so the notice fail to reach the indorser, the misfortune falls on him, not on the holder. There must be ordinary or reasonable diligence, such as men of business usually exercise when their interest depends upon obtaining correct information. The holder must act in good faith, and not give credit to doubtful intelligence, when better could have been obtained. . . . The case then comes to this. The plaintiffs applied for information to a man worthy of belief, and who was likely to know where the indorser lived. They received such an answer as left no reasonable ground for doubt that C. was the place to which the notice should be sent. I think they were not bound to push the inquiry further. Men of business usually act upon such information. They buy and sell, and do other things affecting their interest, upon the credit which they give to the declarations of a single individual concerning a particular fact of this kind within his knowledge. This is matter of common experience. Ordinary diligence in a case like this can mean no more than that the inquiry shall be pursued until it is satisfactorily answered. This is the only practical rule. If the holder of a bill is required to go further, it is impossible to say where he can safely stop. Would it be enough to inquire of two, three, or four individuals, or must he seek intelligence from every man in the place likely to know anything about the matter? It would be difficult, if not impossible, to answer this question."

(i) *Supra*, p. 493, note d.

(j) *Bradley v. Davis*, 26 Maine, 45. See *Dana v. Kemble*, 19 Pick. 112; *Washington, J., Bank of U. S. v. Corcoran*, 2 Pet. 121, 132. In *Wharton v. Wright*, 1 Car. & K. 585, the bill was dated "Brunswick Hotel." The defendant, an indorser, was employed on various railways, and had no fixed place of residence. His wife had made a memorandum that she had received the notice. Held admissible to prove reception of the notice by the defendant, the wife being dead, and a verdict was rendered against him.

(k) *Supra*, p. 478, note v.

(l) *Carson v. State Bank*, 4 Ala. 148; *Crisson v. Williamson*, 1 A. K. Marsh. 454; *Rand v. Reynolds*, 2 Gratt. 171, *infra*, p. 497, note m; *Thorn v. Rice*, 15 Maine, 263; *Story, J., Bank of U. S. v. Carneal*, 2 Pet. 543, 551.

same town, a notice directed to the town, without specifying any particular part of it, is sufficient, *(m)* unless the holder knew, or ought to have known, at which post-office the party to be notified resorted for his letters, in which case the notice should be sent there. *(n)* Where there is no post-office in the town where the drawer or indorser resides, notice would seem to be sufficient if sent to the nearest post-office, *(o)* although there are authorities

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*(m)* Bank of Manchester v. Slason, 13 Vt. 334, where notice was not sent to the post-office nearest the place of residence of the indorser, and where he usually got his letters; Catskill Bank v. Stall, 15 Wend. 364; Remer v. Downer, 23 id. 620. 21 id. 10; Morton v. Westcott, 8 Cush. 425; Cabot Bank v. Russell, 4 Gray, 167. See Hazelton Coal Co. v. Ryerson, Spencer, 129; Gale v. Kemper, 10 La. 205; Cuyler v. Nellis, 4 Wend. 398, which held that in such case the holder was bound to make reasonable inquiries to ascertain to which post-office the indorser usually resorts, or which is the nearest one, is overruled. This last seems to be the opinion held in Ferris v. Saxton, 1 South. 1; Taylor v. Bank of Ill., 7 T. B. Mon. 576. In Becnel v. Tournillon, 6 Rob. La. 500, a notice directed to a parish generally, in which there were several post-offices, was held insufficient. But in Follain v. Dupre, 11 id. 454, it was proved that the notice so directed would regularly go to the office nearest the indorser's residence, and the indorser was held. In Rand v. Reynolds, 2 Gratt. 171, a notice sent to a post-office within the same district in which the indorser lived was held sufficient; although the indorser usually got his letters in a different town, which was nearer his residence. In Weakly v. Bell, 9 Watts, 273, a notice sent to the shire town of the county where the indorser lived was held sufficient, although there was a nearer post-office which he was in the habit of using.

*(n)* In Morton v. Westcott, 8 Cush. 425, Shaw, C. J. said: "It seems well settled, that, when there are two post-offices in a town, notice by letter to an indorser addressed to him at the town generally is sufficient, unless the party addressed has been generally accustomed to receive his letters at one of the offices in particular, and to have his letters addressed to him there by his correspondents. Such being the rule, the plaintiff proves his case, *prima facie*, by proving notice by letter addressed to the defendant at the town generally. If, then, the defendant would rebut this presumption of fact, and bring himself within the exception, it lies on him to prove that he did usually receive his letters at one office only, and that this might have been known by reasonable inquiry at the place where the letter was mailed. Without this proof it may be true that the defendant received his letters habitually as well at one post-office as the other, and then the plaintiff's *prima facie* proof remains unrebuted, and he must prevail."

*(o)* Shed v. Brett, 1 Pick. 401; Union Bank v. Stoker, 1 La. Ann. 269; Priestley v. Bisland, 9 Rob. La. 422. See Mainer v. Spurlock, id. 161; Duncan v. Sparrow, 3 id. 264; Mechanics', &c. Bank v. Compton, id. 4; Nicholson v. Marders, id. 242; Union Bank v. Brown, 1 id. 107; Nott v. Beard, 16 La. 308. See Foreman v. Wikoff, id. 20; Downer v. Remer, 21 Wend. 10; Dunlap v. Thompson, 5 Yerg. 67, where the indorser had removed a few days before maturity, and a notice sent to the former place was held sufficient; Farmers', &c. Bank v. Battle, 4 Humph. 86; State Bank v. Ayers, 2 Halst. 130; Hazelton Coal Co. v. Ryerson, Spencer, 129; Ferris v. Saxton, 1 Southard, 1; Cuyler v. Nellis, 4 Wend. 398; Taylor v. Bank of Ill., 7 T. B. Mon. 576; Bondurant v. Everett, 1 Met. Ky. 658; Thompson, J., Bank of Columbia v. Lawrence, 1 Pet. 578, 583; Story, J., Bank of U. S. v. Carneal, 2 id. 543, 551. In Davis v. Beekham, 4

which hold that a special messenger should sometimes be used ; (*p*) and where the nearest post-office is unknown, a notice directed to that which, on proper inquiry, is supposed to be the nearest, will suffice. (*q*) But it is held, that notice may be sent to the post-office to which the indorser usually resorts, although there are other offices nearer his place of residence, (*r*) and although this office is in a different town from the one in which the party to be notified lives. (*s*) . And in conformity with the same principle it is held, that where the indorser is in the habit of receiving his letters at either one of three post-offices, the notice may be sent to either of the three. (*t*)

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Humph. 53, notice was sent to the one designated as the nearest ; but on proof being offered that it had been discontinued for a year, the notice was held insufficient. In *Davis v. Williams*, Peck, 191, the plaintiff, knowing where the defendant lived, sent the notice to a place sixteen miles distant, although there was a post-office within five miles. The indorser was discharged. In *Moore v. Hardcastle*, 11 Md. 486, notice was sent to the shire town of the county, when the indorser lived twelve miles distant. His usual post-office was four miles from his residence. There was no proof of any inquiry by the notary for the nearest post-office. Held insufficient.

(*p*) *Supra*, pp. 478, 479.

(*q*) *Marsh v. Barr*, Meigs, 68, 9 Yerg. 253.

(*r*) *Bank of U. S. v. Carneal*, 2 Pet. 543 ; *Thompson, J., Bank of Columbia v. Lawrence*, 1 id. 578, 583 ; *Bank of Geneva v. Howlett*, 4 Wend. 328 ; *Whittlesey, J., Seneca Co. Bank v. Neass*, 5 Denio, 329, 338 ; *Mercer v. Lancaster*, 5 Penn State, 160 ; *Sherman v. Clark*, 3 McLean, 91 ; *Bank of Louisiana v. Watson*, 15 La. 38 ; *Mead v. Carnal*, 6 Rob. La. 73 ; *New Orleans, &c. Co. v. Robert*, 9 id. 130 ; *Grand Gulf, &c. Co. v. Barnes*, 12 id. 127 ; *New Orleans, &c. Co. v. Barrow*, 2 La. Ann 326 ; *Hepburn v. Ratliff*, id. 331 ; *New Orleans, &c. Co. v. Patton*, id. 352 ; *Citizens' Bank v. Walker*, id. 791 ; *Bank of Louisiana v. Tournillon*, 9 id. 132 ; *Farmers', &c. Bank v. Battle*, 4 Humph. 86 ; *Hazelton Coal Co. v. Ryerson*, Spencer, 129 ; *Walker v. Bank of Augusta*, 3 Ga. 486 ; *Moore v. Hardcastle*, 11 Md. 486 ; *Gist v. Lybrand*, 3 Ohio, 307 ; *Glasscock v. Bank of Mo.*, 8 Misso. 443.

(*s*) *Bank of Columbia v. Lawrence*, 1 Pet. 578 ; *Reid v. Payne*, 16 Johns. 218 ; *Bank of Geneva v. Howlett*, 4 Wend 328 ; *Ransom v. Mack*, 2 Hill, 587 ; *Morris v. Husson*, 4 Sandf. 93 ; *Whittlesey, J., Seneca Co. Bank v. Neass*, 5 Denio, 329, 338. See *Montgomery Co. Bank v. Marsh*, 3 Seld. 481 ; *Shaw, C. J., Chouteau v. Webster*, 6 Met. 1. 6 ; *Bank of Columbia v. Magruder*, 6 Harris & J. 172 ; *Grand Gulf, &c. Co. v. Barnes*, 12 Rob. La. 127 ; *Bird v. McCalop*, 2 La. Ann. 351 ; *New Orleans, &c. Co. v. Patton*, id. 352 ; *Glasscock v. Bank of Mo.*, 8 Misso. 443.

(*t*) *Bank of U. S. v. Carneal*, 2 Pet. 543. The earlier cases on this point in Louisiana held that the notice must be sent to the nearest. *Mechanics', &c. Bank v. Compton*, 3 Rob La. 4 ; *Nicholson v. Marders*, id. 242 ; *Mead v. Carnal*, 6 id. 73. In *Follain v. Dupre*, 11 id. 454, it was held that, where there was only a difference of a mile or two in the distances of the offices from the indorser's residence, the notice might be sent to either. And in the later cases — *New Orleans, &c. Co. v. Briggs*, 12 id. 175 ; *Bank of Louisiana v. Tournillon*, 9 La. Ann 132 — it is held that, where there are two or more usual offices, notice may be sent to either.

## SECTION IV.

## TO WHOM NOTICE SHOULD BE GIVEN.

UPON the question to whom notice must be given, although the practice is sufficiently uniform, it is not easy to state a rule which meets all the cases. We think, however, that the true rule, although it may not reconcile all the authorities, and indeed must be open to some exceptions, should be this: Every person who, by and immediately upon the dishonor of the note or bill, and only upon such dishonor, becomes liable to an action, either on the paper, or on the consideration for which the paper was given, is entitled to immediate notice.

Notice should certainly be given to all the parties, but the holder is bound to give notice only to the indorser whom he intends to hold liable, and he may charge a subsequent indorser without notifying a prior,<sup>(u)</sup> or a prior without notifying a subsequent one,<sup>(v)</sup> provided the party whom he notifies exercises his right to secure himself by giving notice further. Notice may certainly be given to the agent of the party to be notified.<sup>(w)</sup> It has been said that strict proof of authority to receive notice is required,<sup>(x)</sup> but this cannot apply where notice is properly left at the place of business or of abode of the party to be notified, because a notice left there with any one who is found on the

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(u) *Baker v. Morris*, 25 Barb. 138; *Morgan v. Van Ingen*, 2 Johns. 204; *Morgan v. Woodworth*, 3 Johns. Cas. 89; *Carter v. Bradley*, 19 Maine, 62; *State Bank v. Hennen*, 16 Mart. La. 226; *Peyroux v. Dubertrand*, 11 La. 32; *McCulloch v. Commercial Bank*, 16 id. 566; *Union Bank v. Lea*, 7 Rob. La. 76; *Union Bank v. Hyde*, id. 418; *Grand Gulf, &c. Co. v. Barnes*, 12 id. 127; *Watson v. Templeton*, 11 La. Ann. 137; *Lawson v. Farmers' Bank*, 1 Ohio State, 206; *Wilcox v. Mitchell*, 4 How. Miss. 272; *Valk v. Bank of South Carolina*, 1 McMullan, Eq. 414; *Mathews v. Fogg*, 1 Rich. 369; *Whitman v. Farmers' Bank*, 8 Port. Ala. 258.

(v) *Harrison v. Ruscoe*, 15 M. & W. 231.

(w) *Hestres v. Petrovie*, 1 Rob. La. 119; *Wilkins v. Commercial Bank*, 6 How. Miss. 217. An attorney at law is not authorized to receive notices for his client unless by special authority. *Louisiana State Bank v. Ellery*, 16 Mart. La. 87. In *Fortner v. Parham*, 2 Smedes & M. 151, delivery of a notice to the indorser's clerk in the street, without proof of its reception, or of the clerk's authority to receive it, was held insufficient. In *Paterson Bank v. Butler*, 7 Halst. 268, notice delivered to a stranger, who said he was the indorser's brother, was held insufficient.

(x) *Montillet v. Duncan*, 11 Mart. La. 534.

premises would ordinarily be sufficient.(y) We have seen that a presentment to any one there would be sufficient,(z) and if this is true where something is expected to be done by the party of whom the demand is made, it certainly is true where nothing is to be done except to receive a notice.

Authority to indorse negotiable paper has been held not to carry with it authority to receive notice of dishonor,(a) but an opinion to the contrary has been expressed.(b)

If an agent draws a bill in his own name, notice must be given to him, and if given to his principal, who is no party to the paper, it will not be sufficient.(c)

If a person entitled to notice be bankrupt, notice should be given to him, if his assignees are not yet appointed.(d) If they are, notice should perhaps be given to them, if the fact of their appointment is known to the holder, or might be known by him by the exercise of due diligence,(e) but notice might perhaps even then be sufficient if given to the bankrupt. Under our State insolvent laws, and wherever the point has not been settled by decision or a positive usage, it would seem to be the safest course to give notice both to the insolvent and to the assignees also.

If the insolvent has absconded, notice should be given to the assignees ; (f) and if they are not appointed, we should suppose that a delay until their appointment would not discharge any one ; and although notice may be given to any one holding or representing the estate,(g) we should think it better to notify the assignees when appointed.

If the indorser is dead at the time the note matures, and this

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(y) *Cromwell v. Hynson*, 2 Esp. 511 ; *Housego v. Cowne*, 2 M. & W. 348, where notices left at the indorser's house with his wife were held sufficient.

(z) *Supra*, p. 489, note x.

(a) *Valk v. Gaillard*, 4 Strob. 99 ; *Sharkey*, C. J., *Wilcox v. Routh*, 9 Smedes & M. 476, 483.

(b) Lord *Tenterden*, C. J., *Firth v. Thrush*, 8 B. & C. 387.

(c) *Grosvenor v. Stone*, 8 Pick. 79. In *Clay v. Oakley*, 17 Mart. La. 137, it was held. that, where the agent indorses in the principal's name, notice to the latter is sufficient. Whether it might be safely given to the agent in such case may depend upon the question whether an authority to indorse carries with it an authority to receive notice.

(d) See *Ex parte Moline*, 19 Ves. 216.

(e) See *Rohde v. Proctor*, 4 B. & C. 517, 6 Dow. & R. 610 ; *Ex parte Johnson*, 3 Deac. & C. 433, 1 Mont. & A. 622 ; *Ex parte Chappel*, 3 Mont. & A. 490, 3 Deac. 215.

(f) *Rohde v. Proctor*, 4 B. & C. 517, 6 Dow. & R. 610.

(g) See *Rohde v. Proctor*, 4 B. & C. 517, 6 Dow. & R. 610.

fact is known to the holder, notice must be sent to his administrators or executors, if it can be ascertained by reasonable inquiries who and where they are,<sup>(h)</sup> and a notice directed to the deceased by name will, under such circumstances, be insufficient to charge the estate. If the death is not known, and nothing appears to show that the sender ought to have known this fact, notice addressed to the deceased indorser will be sufficient,<sup>(i)</sup> and the same would be true where the holder cannot by reasonable diligence ascertain whether there is an administrator or executor, or who he is or where he resides.<sup>(j)</sup>

It may not always be necessary to designate the administrator or executor by name. Thus, where the notary, being ignorant as to who the administrator or executor was, sent the notice directed to the "legal representative" of the indorser, but mailed to his last place of residence, this was held sufficient, although the notary might have ascertained the name without much trouble, on the ground that "legal representative" and "administrator" or "executor" are synonymous terms.<sup>(k)</sup>

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<sup>(h)</sup> *Oriental Bank v. Blake*, 22 Pick. 206, where the holder, knowing that the indorser was dead, left the notice at his last place of residence. Held insufficient. So *Cayuga Co. Bank v. Bennett*, 5 Hill, 236, where the holder knew of the indorser's death, that his will had been proved, and that it was in the surrogate's office, in the village where the holder lived. In *Barnes v. Reynolds*, 4 How. Miss. 114, the notice was sent to the indorser's last residence. The judge charged the jury, that if the holder knew of the death of the indorser, and could by ordinary diligence have ascertained who his executors were, it was incumbent on him to give them notice; but if the holder did not know of the death, or by ordinary diligence could not have ascertained who were the executors, the notice directed to the intestate was sufficient. Held correct, and a verdict for the plaintiff was sustained. Where an indorser died eight months before the note matured, notice directed to him was held bad, in the absence of proof by the plaintiff of due diligence in ascertaining who were the representatives. *Bank of Louisiana v. Smith*, 4 Rob. La. 276. But where the heir has been put in possession of the estate before maturity, notice directed to the indorser's legal representative is not sufficient. *Christmas v. Fluker*, 7 id. 13. But notice should be sent to the executor, although the heir had been recognized, had given security, and taken possession, if the executor has not rendered any account, nor received from the heir the money necessary to pay the debts. *New Orleans, &c. Co. v. Kerr*, 9 Rob. La. 122. See the cases cited *infra*, chapter on Excuses for Want of Notice.

<sup>(i)</sup> *Merchants' Bank v. Birch*, 17 Johns. 25; *Planters' Bank v. White*, 2 Humph. 112. See *Beals v. Peck*, 12 Barb. 245; *Barnes v. Reynolds*, 4 How. Miss. 114, *supra*, note *h*. Lapse of time may have the effect of requiring the plaintiff to prove due diligence. See *Bank of Louisiana v. Smith*, 4 Rob. La. 276, *supra*, note *h*.

<sup>(j)</sup> *Metcalf, J., Mass. Bank v. Oliver*, 10 Cush. 557; *Stewart v. Eden*, 2 Caines, 121; *Barnes v. Reynolds*, 4 How. Miss. 114, *supra*, note *h*.

<sup>(k)</sup> *Pillow v. Hardeman*, 3 Humph. 538.



But a notice sent to the "estate" of a deceased was held insufficient, where the name of the administrator could have been ascertained without much difficulty.<sup>(l)</sup> The reason given was, that the word "estate" was too ambiguous, comprehending the heir-at-law equally with the administrator or executor. In all these cases, as in many others, if it reaches the administrator or executor seasonably, the notice will be good, and proof of its reception will supply any defects in the sending.<sup>(m)</sup> Notice to one of several administrators or executors has been held sufficient, on the ground that they, like partners, all represent one and the same interest.<sup>(n)</sup>

Notice to one member of a partnership which indorses a note or bill is notice to all, because each partner represents the interests of the other partners and of the partnership,<sup>(o)</sup> and the same has been held where the notice has been given after dissolution and publication.<sup>(p)</sup> So if one of the firm dies before maturity, notice to the surviving partner is sufficient to hold the estate and the legal representative of the deceased.<sup>(q)</sup> If a bill be drawn on the firm by one partner, and accepted by him, notice of dishonor need not be given to the firm.<sup>(r)</sup>

But the interests of each joint indorser are not so far similar that notice to one is notice to all; they should all be notified; <sup>(s)</sup> nor should a notice to any mere member of a joint-stock com-

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(l) *Mass. Bank v. Oliver*, 10 Cush. 557.

(m) *Cowen, J., Cayuga Co. Bank v. Bennett*, 5 Hill, 236. See *Beals v. Peck*, 12 Barb. 245; *Mass Bank v. Oliver*, 10 Cush. 557.

(n) *Beals v. Peck*, 12 Barb. 245; *Lewis v. Bakewell*, 6 La. Ann. 359, where notice was given to the maker, one of three executors of the indorser.

(o) *Nott v. Douming*, 6 La 680, 684; *Magee v. Dunbar*, 10 id. 546. See *Beals v. Peck*, 12 Barb. 245, 251; *Willis v. Green*, 5 Hill, 232; and cases cited *infra*, note r.

(p) *Coster v. Thomason*, 19 Ala. 717.

(q) *Cocke v. Bank of Tenn*, 6 Humph. 51; *Dabney v. Stidger*, 4 Smedes & M. 749.

(r) *Rhett v. Poe*, 2 How. 457; *Fuller v. Hooper*, 3 Gray, 334; *Gowan v. Jackson*, 20 Johns. 176; *Porthouse v. Parker*, 1 Camp. 82; *Bignold v. Waterhouse*, 1 Maule & S. 255.

(s) *Shepard v. Hawley*, 1 Conn. 367; *Willis v. Green*, 5 Hill, 232; *Beals v. Peck*, 12 Barb. 245. See *Bank of Chenango v. Root*, 4 Cowen, 126; *Sayre v. Frick*, 7 Watts & S. 383; *Miser v. Trovinger*, 7 Ohio State, 281; *State Bank v. Slaughter*, 7 Blackf. 133; *Dabney v. Stidger*, 4 Smedes & M. 749; *Wood v. Wood*, 1 Harrison, 429. *Contra*, *Dodge v. Bank of Ky.*, 2 A. K. Marsh. 610, 615; *Higgins v. Morrison*, 4 Dana, 100, 105; *Byles on Bills*, p. 229, citing *Porthouse v. Parker*, 1 Camp. 82. In this case, however, by the head note, it appears that the drawers were partners.



pany, who was not an officer nor agent of the company, suffice to bind the corporation.(t)

If one not a party to the note assign it without indorsement, he is not entitled to strict notice.(u) But where an action on the consideration or on the paper, as on guaranty or the like, accrues to the transferee, we should say the transferrer was entitled to have notice given him.(v) We shall also, under the subject of Guaranty, see that a guarantor of a promissory note is entitled only to have such notice as shall be actually sufficient for his safety, and cannot in general defend himself by showing want of notice, without showing also actual injury.(w)

## SECTION V.

### BY WHOM NOTICE SHOULD BE GIVEN.

THERE appears to be considerable confusion in the language of the courts, and in the cases, with reference to the party by whom notice should be given. Thus it has been said that notice must come from the holder, and that a notice given by any other party was insufficient, because the drawer or indorser is not apprised thereby of the holder's intention to look to him for payment.(x)

It has also been said that it makes no difference who apprises the drawer, since the object of the notice is that the drawer may have recourse to the acceptor.(y)

It has likewise been said that any party to the bill may give notice.(z)

The first of these propositions is clearly inaccurate, because it has long been settled that a notice properly given by a prior indorser, in due time, will enure to the benefit of the subsequent

(t) See *Powles v. Page*, 3 C. B. 16.

(u) *Van Wart v. Wooley*, 3 B. & C. 439, 445; *Swinyard v. Bowes*, 5 M. & S. 62.

(v) *Infra*, Vol. II. p. 137.

(w) *Infra*, Vol. II. p. 137.

(x) *Tindal v. Brown*, 1 T. R. 167, 2 id. 186; *Ex parte Barclay*, 7 Ves. 597. These cases were expressly overruled by *Chapman v. Keane*, 3 A. & E. 193, 4 Nev. & M. 607.

(y) Lord *Kenyon*, *Shaw v. Croft*, *Chitty on Bills*, p. 333.

(z) 3 Kent. Com. 108; Lord *Ellenborough*, *Wilson v. Swabey*, 1 Stark. 34; *Glasgow v. Pratte*, 8 Misso. 336. See *Glasscock v. Bank of Mo.*, id. 443; *Walker v. Bank of Mo.*, id. 704; *Duncan, J., Juniata Bank v. Hale*, 16 S. & R. 157, 160.

parties.(a) Thus, if the holder duly notifies the sixth indorser, and he the fifth, and he the fourth, and he the third, and he the second, and he the first, the latter will be liable to all the parties.(b) So notice duly given by a subsequent indorser to the prior indorser will enure to the benefit of all up to the first.(c) Thus, if the holder in the case supposed duly notified all the indorsers, the first indorser will be liable to all, although the holder was the only party to give the notice.

The second proposition cannot be true, because it is equally well settled that notice cannot be given by a stranger to the note or bill.(d)

The third proposition is inaccurate, because it is clear that notice cannot be given by any party who is himself discharged by the laches of any prior party, either on his own account,(e) or for the benefit of other parties to the bill.(f) There appears to be much doubt whether notice given by the acceptor who refuses to pay is a good notice, which can enure to the benefit of any other party. It has been decided that a notice so sent to the drawer is sufficient to bind him.(g) But this has been much questioned,(h) on the ground that one of the objects of sending

(a) *Jameson v. Swinton*, 2 Camp 373. 2 Tannt. 224; *Wilson v. Swabey*, 1 Stark. 34; *Bray v. Hadwen*, 5 Maule & S. 68; *Chapman v. Keane*, 3 A. & E. 193, 4 Nev. & M. 607; *Lysaght v. Bryant*, 9 C. B. 46; *Triplett v. Hunt*, 3 Dana, 126; *Whitman v. Farmers' Bank*, 8 Port. Ala. 258; *Wilcox v. Mitchell*, 4 How. Miss. 272; *Renshaw v. Triplett*, 23 Misso. 213; *Glasscock v. Bank of Mo.*, 8 Misso. 443 See *Baker v. Morris*, 25 Barb. 138.

(b) In *Hilton v. Shepherd*, 6 East, 14, note c, there were six indorsers, and notice was regularly given by the indorsers in succession. The second sued the first indorser, and recovered.

(c) *Stafford v. Yates*, 18 Johns. 327; *Abat v. Rion*, 9 Mart. La. 465; *Marr v. Johnson*, 9 Yerg. 1; *Wilcox v. Mitchell*, 4 How. Miss. 272. Whether this is confined to the case of actual reception by the party to be charged, or whether, if a subsequent indorser, after using due diligence, sends the notice to the wrong place, this enures to the benefit of any party, is considered *infra*, p. 627.

(d) *Stewart v. Kennett*, 2 Camp. 177; *Chanoine v. Fowler*, 3 Wend. 173; *Duncan, J. Juniata Bank v. Hale*, 16 S. & R. 157, 160; *Tuck, J., Brailsford v. Williams*, 15 Md. 150, 158.

(e) *Turner v. Leech*, 4 B. & Ald. 451; *Rowe v. Tipper*, 13 C. B. 249.

(f) See *Harrison v. Ruscoe*, 15 M. & W. 231.

(g) By Lord *Kenyon*, at Nisi Prius, in *Shaw v. Croft*, Chitty on Bills, p. 333; Lord *Ellenborough*, in *Rosher v. Kieran*, 4 Camp. 87; *Brailsford v. Williams*, 15 Md. 150; *Union Bank v. Grimshaw*, 15 La. 321.

(h) Bayley on Bills, 6th London ed. 250; Chitty on Bills, 333; Byles on Bills, 214; Story, § 304 In *Harrison v. Ruscoe*, 15 M. & W. 231, *Parke, B.*, after quoting the

notice is to inform the party to whom it is sent that he is looked to for payment by the party who sends; and inasmuch as the acceptor who refuses to pay has no claim upon the drawer, or on any party to the bill, he cannot make any demand. A drawee who refuses to accept is not a proper party to give notice; (i) and it is somewhat difficult to see what difference there is in the case of an acceptor refusing to pay.

It seems also to have been held that the maker may give notice. (j) On the whole, we do not see why, if the party primarily liable is a proper person to give notice, a mere stranger may not. Our own method of stating the rule, independently of these authorities, would be, that notice may be given by any party to a note or bill, not primarily liable thereon as regards third parties, and not discharged from liability upon it at the time notice is given.

It will not be understood that these remarks apply to an acceptor *supra* protest, as it is within his power to give notice of the dishonor by the original drawer, and he will have a claim founded thereon, and on his own acceptance. (k)

The holder may of course give notice by his agent, (l) who may give the notice in his own name, (m) or in the name of one of the other parties. (n) But in this last case, the party charged by the notice will be entitled to insist on any defence against the real principal which he might have made against the party from whom the notice purported to come. (o)

A person to whom a note is indorsed for the purpose of collec-

rule laid down by Judge Story with approbation, said: "The rule equally excludes the case of notice by an acceptor, who never could sue himself upon the bill after taking it up; and the instances in which a notice by an acceptor has been held good at *Nisi Prius* are explained by Mr. Justice Bayley, on the supposition that in these the acceptor had a special authority to do so."

(i) *Stanton v. Blossom*, 14 Mass. 116.

(j) *Glasgow v. Pratte*, 8 Misso. 336.

(k) *Supra*, p. 319.

(l) *Harris v. Robinson*, 4 How 336; *Tunno v. Lague*, 2 Johns. Cas. 1; *Shed v. Brett*, 1 Pick. 401; *Follain v. Dupré*, 11 Rob. La. 454, 470; *Walker v. Bank of Mo.*, 8 Misso. 704; *Crawford v. Branch Bank*, 7 Ala. 205, 213. In *East v. Smith*, 4 Dow. & L. 744, it was doubted by *Coleridge, J.* whether a tradesman's foreman or servant was a proper party.

(m) *Woodthorpe v. Lawes*, 2 M. & W. 109.

(n) *Rogerson v. Hare*, 1 Willm. W. & D. 65, 1 Jur. 71; *Harrison v. Ruscoe*, 15 M. & W. 231.

(o) *Harrison v. Ruscoe*, 15 M. & W. 231.

tion is a proper party to give notice; (*p*) and so is a notary to whom the note is handed to protest, (*q*) though the latter officer is not obliged to give it. (*r*)

If the holder is dead, notice should be given by his administrator or executor, if any are appointed; (*s*) and if none are appointed at the time of maturity, the indorser will not be discharged, provided notice is sent to him within a reasonable time after his appointment. (*t*) So it would be if the note or bill is not discovered, or its existence known to the administrator at maturity, (*u*) provided the administrator is not guilty of laches in not finding it, and forwards the notice immediately after finding it.

It has been held that a signature is essential to a notice, because if a notice is not signed, it cannot be said to be given by any person; (*v*) but it has been also said that a notice was good whether signed or not, (*w*) and we have also seen that it need not state who the holder was at the time of maturity. (*x*)

It has been said that it is the duty of a notary who makes a protest to give notice of it. (*xa*) But although it is usual and convenient for the notary to give notice, and he has undoubtedly sufficient authority to do this as the agent of the holder, it is quite certain that this is no part of his official duty. (*xb*)

## SECTION VI.

### AT WHAT TIME NOTICE SHOULD BE GIVEN.

ONE of the most important questions under the law of notice is, Within what time must the notice be sent? The rule, as laid

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(*p*) *Ogden v. Dobbin*, 2 Hall, 112. So it may be given by his agent. *Cowperthwaite v. Sheffield*, 1 Sandf. 416, 3 Comst. 243.

(*q*) *Infra*, p. 645.

(*r*) *Infra*, p. 645, note 1.

(*s*) Story on Prom. Notes, § 304.

(*t*) *Infra*, p. 559.

(*u*) *Infra*, p. 559.

(*v*) *Walker v. Bank of Mo.*, 8 Misso. 704.

(*w*) *Henderson, J., Bank of Cape Fear v. Seawell*, 2 Hawks, 560.

(*x*) *Supra*, p. 473, note.

(*xa*) *Cowen, J., in Halliday v. McDougall*, 20 Wend. 66.

(*xb*) *Burke v. McKay*, 2 How. 66.

down in the earlier English cases,<sup>(y)</sup> and in some of the American cases,<sup>(z)</sup> was, that notice must be sent within a reasonable time after dishonor, and that what was a reasonable time was a question of fact for the jury. Now, however, the courts have fixed this period so definitely as a matter of law, that it hardly seems appropriate to speak of it as a merely reasonable time, although this continues to some extent to be the language both of text-writers and of judicial decisions.<sup>(a)</sup>

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(y) We have already seen that originally the rule was, that a demand and protest might be made in a reasonable time after the day a note or bill matured. In *Russel v. Langstaffe*, 2 Doug. 514, one of the notes was payable Sept. 22, two on Sept. 27, and two on Oct. 4. The plaintiff notified the indorser on Oct. 14. Objection was made that this was not in time. The counsel for the defendant "admitted that what shall be deemed reasonable notice to an indorser of non-payment by the drawer ought properly to be decided by the jury, but said it was well established that such notice ought to be as early as possible. That where the parties live at a distance, the notice ought to be given by the first post, but that here the parties lived in the same town, and no notice had been given till ten days after the time of payment, even in the case of the notes payable in October." But the case turned on another point. In *Hilton v. Shepard*, 6 East, 14, note c, *Hopes v. Alder*, id. 16, note, Lord Kenyon thought the question to be one for the jury, notwithstanding the case of *Tindal v. Brown*, 1 T. R. 167.

(z) The early cases in Pennsylvania do not appear to be quite consistent. In *Steinmetz v. Currey*, 1 Dall. 234, 270, the court admit that notice must be given in a reasonable time, but set aside a verdict for the plaintiff where there had been a delay of over two years, holding that the war which then existed was no excuse for so long a delay, the parties living within one hundred and fifty miles of each other. But in the following cases the time was held a matter of fact for the jury. *Robertson v. Vogle*, 1 Dall. 252; *Bank of North America v. Vardon*, 2 id. 78; *Bank of North America v. M'Knight*, id. 158, 1 Yeates, 145, where there was a delay of one day; *Mallory v. Kirwan*, 2 Dall. 192; *Warder v. Carson*, id. 233, 1 Yeates, 531; *Bank of North America v. Pettit*, 4 Dall. 127; *Gurly v. Gettysburg Bank*, 7 S. & R. 324, where there was a delay of five days, and a verdict for the plaintiff was sustained. There seems to be a similar conflict in the cases in North Carolina. In *Pons v. Kelly*, 2 Hayw. 45, it was held that the court are to judge of what is reasonable time. In *London v. Howard*, id. 332, it was submitted to the jury, the judge, however, expressing to them his opinion that ten days' delay was too much. The jury found for the defendant. In *Brittain v. Johnson*, 1 Dev. 293, the reasonable time was held a matter of fact, and also that the strict rules as to negotiable paper did not apply, as between farmers in the country. In *Brahan v. Ragland*, Minor, 85, the question was held to be one of fact. So *Hager v. Boswell*, 4 J. J. Marsh. 61.

(a) In *Tindal v. Brown*, 1 T. R. 167, notice was not given until two days after the note matured. The jury found for the plaintiff, and a new trial was granted. A second verdict for the plaintiff was likewise set aside, and a third resulted in a verdict for the defendant. This judgment was affirmed in the Exchequer Chamber, 2 T. R. 186. See *Darbishire v. Parker*, 6 East, 3. In *Furze v. Sharwood*, 2 Q. B. 388, 415, Lord Denman, C. J. said: "Perhaps Lord Mansfield never conferred so great a benefit on the commercial world as by his decision in *Tindal v. Brown*, where his perseverance compelled them, in spite of themselves, to submit to the doctrine of requiring immedi-

It is clear that there can be no notice without a prior demand, because notice must be based upon the fact that presentment has been made, and payment refused. (b)

There appears to be some want of precision in the language of the text-writers, and of some of the courts, in laying down the rule as to the time within which notice must be deposited in the post-office in order to charge the indorsers. One eminent jurist has expressed an opinion that notice will be sufficient if mailed at any time on the day after dishonor, although it may not be in season to go by the mail of that day. (c) But this opinion is open to the objection, that it would be almost necessarily giving the holder more than the entire day after dishonor; as, for instance, if the only daily mail for the place where the indorser lives should close at 8 P. M., and the holder were allowed to deposit

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ate notice as a matter of law." We are aware of no modern cases in this country in which a different doctrine is held. There may not, however, be so great a conflict between the decisions which hold the question to be one of law and those in which it is said to be a matter of fact, or a mixed question of law and fact, as might at first appear. The rule as now generally laid down is, that the courts have established a definite limit, within which the plaintiff must prove that he sent the notice, or else must show such circumstances as will excuse him from a strict compliance with the rule; and this last fact must necessarily open the whole question, as it may depend on such a variety and complication of facts that the intervention of a jury is essential to decide the matter. In *Stott v. Alexander*, 1 Wash. Va. 331, a bill was drawn in Philadelphia on London, and protested there in September. Notice was received in the latter part of the following June. The court thought the notice was reasonable. In *Pinder v. Nathan*, 4 Mart. La. 346, the question was held to be one of fact; but in *Chandler v. Sterling*, 9 id. 565, it was held to be a mixed question of law and fact. So *Spencer v. Stirling*, 10 id. 88, where there was a delay of one month, and a verdict for the plaintiff was sustained. In *Haddock v. Murray*, 1 N. H. 140, it was said to be a question of fact; but where the facts were ascertained, the court should pass upon it. In *Bryden v. Bryden*, 11 Johns. 187, it was said to be a mixed question of law and fact; but where the facts were clear, it was a question for the court. Three days' delay was held too long. In *Philips v. M'Curdy*, 1 Harris & J. 187, it is said that notice must be given "in due and convenient time, of which the court are to judge." In *Scarborough v. Harris*, 1 Bay, 177, it is said that "the holder of a bill must give reasonable notice to the indorser, that is, by first post or convenient opportunity, which is partly a matter of fact for jury, what is reasonable or not." In *Stanton v. Blossom*, 14 Mass. 116, it is said that notice must be given within a reasonable time. So in *Aldis v. Johnson*, 1 Vt. 136, 140; but the court decided the question.

(b) *Jackson v. Richards*, 2 Caines, 343, where notice was given the last day of grace, and the demand made the succeeding day.

(c) 3 Kent, Com. 106, note e. In a subsequent part of this note, added in one of the more recent editions, the learned editor appears to have adopted the stricter view, and, as is conceived, fallen into the opposite error. See also the remarks of *Jackson, J.*, *Johnson v. Harth*, 1 Bailey, 482, 484.

the notice in the office at 9 P. M., the effect of this, would be to allow the holder two days; for the notice might as well be permitted to remain in his desk as to lie in the post-office till the mail for the next day should close. This seems to be a greater relaxation than is consistent with all the leading authorities.

Another suggestion has been made by a distinguished judge and writer, (*d*) which is, that the holder should be required to send the notice by the first mail which starts after twenty-four hours from the time of actual dishonor. But the great objection to this view is, that it would render an inquiry into the exact time of presentment necessary, which would clearly be inconvenient and uncertain.

It has also been said that notice should be sent by the next mail after dishonor, (*e*) or by the next practicable mail. (*f*) This is incorrect, because it might render it necessary to mail the notice on the very day of dishonor, and the cases are clear and decisive on the point that notice need in no case be sent on that day. (*g*) Thus, in one case, where notice was received at 9 A. M., and the mail left at 6 P. M., it was held that notice need not be forwarded that day, although the next subsequent mail did not leave until the second day thereafter. (*h*)

(*d*) Story on Bills, § 290, note. Judge Story simply puts this by way of suggestion. In § 288 the rule is stated with accuracy. See also Prom. Notes, § 324.

(*e*) *Tindal v. Brown*, 1 T. R. 167; *Darbishire v. Parker*, 6 East; 3, 9; *Hubbard v. Troy*, 2 Ired. 134; *Denny v. Palmer*, 5 id. 610; *Whittlesey v. Dean*, 2 Aikens, 263; *Curry v. Bank of Mobile*, 8 Port. Ala. 360; *Hickman v. Ryan*, 5 Littell, 24.

(*f*) *Mitchell v. Degrand*, 1 Mason, 176; *U. S. v. Barker*, 4 Wash. C. C. 464; *Mead v. Engs*, 5 Cowen, 303; *Dodge v. Bank of Ky.*, 2 A. K. Marsh. 610, 616.

(*g*) *Hartford Bank v. Stedman*, 3 Conn. 489; *Whitwell v. Johnson*, 17 Mass. 449; *Housatonic Bank v. Laffin*, 5 Cush. 546; *Howard v. Ives*, 1 Hill, 263; *Bank of U. S. v. Merle*, 2 Rob. La. 117; *Downs v. Planters' Bank*, 1 Smedes & M. 261; *Deminds v. Kirkman*, id. 644. The rule is the same where the parties live in the same place. *Pearson v. Duckham*, 3 Litt. 385; *Noble v. Bank of Kentucky*, 3 A. K. Marsh. 262. The *dictum* of *Parker, C. J.*, in *Woodbridge v. Brigham*, 12 Mass. 403, 404, to the contrary, is overruled by *Grand Bank v. Blanchard*, 23 Pick. 305, where an indorser who was notified on the day after dishonor was held, although it had been the usual course of the bank which sent the notice to notify the parties living in the same town on the last day of grace. There is also a *dictum* of *Hutchins, J.*, in *Nash v. Harrington*, 2 Aikens, 9, to the same effect. See *Whittlesey v. Dean*, id. 263.

(*h*) *Geill v. Jeremy, Moody & M.* 61. It will be seen subsequently, that in general any party who receives a notice is entitled to as much time in which to forward it to the indorser whom he wishes to charge, as the holder at the time of dishonor. In *Bank of Alexandria v. Swann*, 9 Pet. 33, demand was made at 3 P. M. The mail closed at half past 8 P. M. Objection that the notice should have been forwarded thereby was



It is said in some cases that the notice should be sent by the first mail of the next day after dishonor; (i) but the authorities in which it was necessary to decide the point hold that it may be sent by any mail of that day. Thus, where one mail leaves in the morning and another in the evening, the holder has the right to elect which one he will use by which to transmit the notice. (j)

In many cases it is said that notice should be sent by the mail of the next day after dishonor; (k) but most of these were cases

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overruled. So *Mead v. Engs*, 5 Cowen, 303, where the notice was received in the morning, and the mail left at 1 P. M.; *Howard v. Ives*, 1 Hill, 263, where the mail closed at 5 P. M. See also the cases cited *infra*, p. 511, note l, p. 512, note o.

(i) *Dickins v. Beal*, 10 Pet. 572, 581; *Bank of U. S. v. Merle*, 2 Rob. La. 117; *Townsley v. Springer*, 1 La. 122. See *Brown v. Turner*, 11 Ala. 752.

(j) *Goodman v. Norton*, 17 Maine, 381; *Howard v. Ives*, 1 Hill, 263; *Whitwell v. Johnson*, 17 Mass. 449. See *Housatonic Bank v. Laffin*, 5 Cush. 546, where it is said that this is true, however late the last mail might start.

(k) In *Lenox v. Roberts*, 2 Wheat. 373, *Marshall*, C. J. said: "It is the opinion of the court that notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the succeeding day." So also *U. S. v. Barker*, 4 Wash. C. C. 464, 12 Wheat. 559, where the notice was received on one day, and not forwarded by the only mail of the next day, which left at half past 10 A. M. The court held that the indorser was discharged. In *Fullerton v. Bank of U. S.*, 1 Pet. 604, the judge charged the jury that "notice should have been given to the indorser through the medium of the post-office, the day after the last day of grace, in season to go by the succeeding mail." Held correct, as the word "succeeding" must be taken to apply to the words "last day of grace," and not "the day after the last day." *Johnson*, J. said: "With this signification, it was rather more favorable than need be given, since the mail of the next day may have gone out before early business hours, or no mail may have gone out for several days." In the following cases it is laid down that notice should be sent by the next day's mail. *Williams v. Smith*, 2 B. & Ald. 496; *Wright v. Shawcross*, id. 501, note; *Housatonic Bank v. Laffin*, 5 Cush. 546; *Talbot v. Clark*, 8 Pick. 51; *Whitwell v. Johnson*, 17 Mass. 449; *Brown v. Ferguson*, 4 Leigh. 37; *Manchester Bank v. White*, 10 Foster, 456; *Manchester Bank v. Fellows*, 8 id. 302. In *Chick v. Pillsbury*, 24 Maine, 458, *Shepley*, J., in a dissenting opinion, maintained that the notice must be sent, at all events, by the mail of the day succeeding dishonor, however early it may start. The cases of *Goodman v. Norton*, 17 Maine, 381, *Beckwith v. Smith*, 22 id. 125, are cited as sustaining his opinion, but they do not seem to be decisions on the point; or if they are to be so considered, they are overruled by *Chick v. Pillsbury*, 24 Maine, 458. The objections which Mr. Justice Shepley makes to the opinion of the majority of the court are, that that doctrine will introduce too great uncertainty into the law, that this view maintained by him would be certain and uniform. There is no doubt that it would. But then the more lax rule, as stated by Chancellor Kent, *supra*, p. 508, note c, would certainly be as "uniform, certain, and easy of apprehension." There is an objection to that rule, as already stated, it is true. But there is a like objection to the more strict one, which we state in our text. And if it should be necessary to choose between one or the other, we apprehend that it would be more reasonable to adopt the former. But modern decisions, as we shall see, take a middle ground between them.

which hold that a notice so sent is sufficient, which is undoubtedly true, else the court only intended to state the general rule without the qualifications. It is obvious that, if there is no mail the next day, the notice cannot be sent by such a mail; and if by this rule is meant that notice must be sent at any rate by a mail of that day, we should say that it is incorrect. So, if the only mail which leaves on the day after dishonor should close at 2 A. M., and leave at half past three, our opinion is that notice need not be sent by that mail, but may be forwarded by that of the next day. The most recent authorities in which it has been necessary to pass directly upon this point have so decided, and the rule, and, as we think, the correct one, is affirmed to be, that the holder is bound to forward the notice as early as by a mail of the day after dishonor which does not start at an unreasonably early hour; (*l*) and if there is no mail which leaves on that day after a reasonably early hour, the notice is to be forwarded by the next mail which starts

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(*l*) See the remarks of *Johnson, J.*, cited *supra*, p. 510, note *k*. In *Carter v. Burley*, 9 N. H. 558, 570, *Parker, C. J.*, after an able review of the authorities, and laying down the general rule that notice must be sent as early as by the mail of the day following dishonor, said: "This rule, however, must be qualified so far that, if the party receiving the notice cannot, by the exercise of reasonable diligence, forward notice to a prior party by the mail of the day following, it will be sufficient if sent by the next. In this country, where many of the mails go out at an early hour of the morning, and are sometimes closed at an early hour of the evening before, it would be impracticable in some instances, and nearly so in many more, to prepare and forward a notice by the mail of the next day, where notice was received late in the afternoon, or in the evening." In *Sussex Bank v. Baldwin*, 2 Harrison, 487, the judge charged the jury that it was sufficient if the holder put the notice in the post-office on the day after he received it. Held incorrect, and the rule was declared to be, that "the notice must be sent on the day next after the third day of grace, unless the mail of that day go out at so early an hour as to render it impracticable by the exercise of a reasonable diligence." So *Chick v. Pillsbury*, 24 Maine, 458, *Shepley, J.* dissenting; *Mitchell v. Cross*, 2 R. I. 437; *Stephenson v. Dickson*, 24 Penn. State, 148; *Burgess v. Vreeland*, 4 N. J. 71; *Lawson v. Farmers' Bank*, 1 Ohio State, 206; *West v. Brown*, 6 id. 542; *Downs v. Planters' Bank*, 1 Smedes & M. 261; *Deminds v. Kirkman*, id. 644; *Hoopes v. Newman*, 2 id. 71; *Fortner v. Parham*, id. 151; *Wemple v. Dangerfield*, id. 445; *Davis v. Hanly*, 7 Eng. Ark. 645. See *Moore v. Burr*, 14 Ark. 230. In *Farmers' Bank v. Duvall*, 7 Gill & J. 78, the bill was dishonored on April 22d. The mail closed on that day at 9 P. M., six hours after the dishonor, and left the next morning at sunrise. The next subsequent mail closed at 9 P. M. on the 24th, and left at sunrise on the 25th. Held, that a notice might be forwarded by this mail. In *Wemple v. Dangerfield*, 2 Smedes & M. 445, the mail closed at 9 P. M. on the day of dishonor, and left at 4 A. M. of the next day. The mail for the place where the indorser lived left only three times a week. Held, that notice need not be sent by that mail.

thereafter.(m) With respect to what is not a reasonably early hour no precise rule can be laid down, except that, in general, the limit must be defined by business hours, which depend upon the particular habits of the mercantile community in each place,(n) and from this fact arises much of the discrepancy which we find in the cases upon the point.(o)

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(m) *Parker, C. J., supra, note l.* See *Chick v. Pillsbury*, 24 Maine, 458; *Lawson v. Farmers' Bank*, 1 Ohio State, 206; *Downs v. Planters' Bank*, 1 Smedes & M. 261; *Wemple v. Dangerfield*, 2 id. 445, *supra, note l.*; *Farmers' Bank v. Duvall*, 7 Gill & J. 78, *supra, note l.* In *Davis v. Hanly*, 7 Eng. Ark. 645, where the mail went out at an unreasonably early hour of the day after the notice was received, the court held it unnecessary to send the notice by that mail, although the next mail does not appear to have started until a week from that time.

(n) *Sussex Bank v. Baldwin*, 2 Harrison, 487, 494; *Mitchell v. Cross*, 2 R. I. 437.

(o) In *Hawkes v. Salter*, 4 Bing. 715, 1 Moore & P. 750, the bill was dishonored on Saturday. The mail left at half past 9 A. M. An opinion was expressed, though it was not actually decided, that it was sufficient to forward the notice by that mail on Tuesday. It will be seen that Sunday is not counted in such cases. This case has been cited and considered as supporting the opinion of Chancellor Kent, *supra*, p. 508, note c; but it would not seem to do so. The court did not lay down any rule, but simply stated that the notice might be sent by Tuesday morning's mail. We should prefer to consider this as authority for saying that notice need not have been forwarded by the mail on Monday morning, because it closed before business hours commenced in the place where the bill was presented. It will be remarked, that the case states that the mail left at half past 9. It might have closed at an hour or two earlier, so that it would have been necessary to deposit the notice in the office as early as 8 A. M., in order to have it transmitted on that day. In *Mitchell v. Cross*, 2 R. I., 3 A. M. was said to be unreasonably early. 4 A. M. is too early. See *Wemple v. Dangerfield*, 2 Smedes & M. 445, *supra*, p. 511, note l. When the mail closes at 5 A. M., and there is no mail until the second day after, notice may be sent by the latter. *West v. Brown*, 6 Ohio State, 542. The hour of sunrise is too early. *Deminds v. Kirkman*, 1 Smedes & M. 644. In this case the mail left at that time. See also *Farmers' Bank v. Duvall*, 7 Gill & J. 78, *supra*, p. 511, note l. In *Chick v. Pillsbury*, 24 Maine, 458, the mail closed at 6 A. M. and left at 7. Held, that notice need not be sent by it. So *Davis v. Hanly*, 7 Eng. Ark. 645, where the next subsequent mail left a week thereafter. In *Stephenson v. Dickson*, 24 Penn. State, 148, an opinion was expressed that 7 A. M. was not an unreasonably early hour. But in *Commercial Bank v. King*, 3 Rob. La. 243, proof that notice was put into the post-office at 7 A. M. was held sufficient, as the presumption was that it was in time to go by a mail of that day. In *Downs v. Planters' Bank*, 1 Smedes & M. 261, proof that notice was deposited in the post-office at 9 A. M., without proof that the mail closed earlier, was held insufficient. So *Beckwith v. Smith*, 22 Maine, 125. In *Lawson v. Farmers' Bank*, 1 Ohio State, 206, closing the mail at 10 minutes past 9 A. M. was held not to be unreasonably early. And the indorser was discharged, because notice was not sent by it. The mail in this case left at 10 A. M. But in *Burgess v. Vreeland*, 4 N. J. 71, an opinion was expressed, that where the mail closes at half past 9 A. M. it is too early, and the holder is not bound to send the notice by it. In this case it was held that proof that notice was put into the post-office at 12 M. on the day after dishonor, without evidence that there was no mail which closed before that hour, was insufficient. If the mail closes at half past 10 A. M., notice should be

In England it has been held, that, if the parties live in the same town, — and it is said that this means, especially as to London, within the limits of the penny-post, — notice must be given in such season that it will be received, in due course of delivery, on some part of the next day. (*p*)

Each party bound to give notice has the same time, after he receives the notice, within which to transmit it to the party to whom he wishes to look, (*q*) that the holder has; so that, in accordance with what we have already seen, if a party receives the notice from a subsequent party on one day, he is not bound to transmit it to a prior indorser until the next day, and not then, if the mail leaves before business hours. Thus, if a note falls due and is dishonored on Monday, and there are four indorsers, A, B, C, and D, the holder may give notice on Tuesday to D. D, receiving the notice on Tuesday, is not bound to mail it until Wednesday, and if C receives it by due course of mail on Thursday, he is not bound to forward it to B until Friday, and B may then notify A on the day after B receives it. If all these notices were thus regularly given, the owner would hold all the indorsers, although he had notified but one, and though the first indorser had not received the notice until five days after dishonor, and each indorser would hold all who were regularly notified, whether by him or by other parties. But the owner

sent by it. See *U. S. v. Barker*, 4 Wash. C. C. 464. In *Seventh Ward Bank v. Hanrick*, 2 Story, 416, the mail closed at half past 3 P. M. Held, that the plaintiff must prove that he deposited the notice in the office in season to go by that mail.

(*p*) In *Smith v. Mullett*, 2 Camp. 208, the plaintiff received notice on May 20th, and transmitted it to the defendant the next day, but so late that it was not delivered by the penny-post until the 22d. The defendant was discharged. Lord *Ellenborough* said, that the notice might as well have remained in the plaintiff's writing-desk as in the post-office on the night of the 21st, and that consequently the plaintiff was guilty of laches. See *Hilton v. Fairclough*, 2 Camp. 633. In *Dobree v. Eastwood*, 3 Car. & P. 250, the notice was deposited between 5 and 6 P. M. The judge charged the jury, that, if it was deposited in season to be delivered by the penny-post of that day, the indorser would be held; otherwise, not. Verdict for the defendant. The burden is on the plaintiff to prove that he put the notice in the office in season to be received on that day. *Fowler v. Hendon*, 4 Tyrw. 1002. The postmark is not conclusive as to the time. *Stocken v. Collin*, 7 M. & W. 515, where the general rule is also laid down.

(*q*) *Farmer v. Rand*, 16 Maine, 453; *Carter v. Burley*, 9 N. H. 558; *Manchester Bank v. Fellows*, 8 Foster, 302; *Manchester Bank v. White*, 10 id. 456; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Lawson v. Farmers' Bank*, 1 Ohio State, 206; *Smith v. Roach*, 7 B. Mon. 17; *Triplett v. Hunt*, 3 Dana, 126; *Whitman v. Farmers' Bank*, 8 Port. Ala. 258.

would hold none but those regularly notified, and thus he runs the risk of losing his claim against some of the parties by the negligence or indifference of others.

He may choose to make this sure, and this he may do by notifying all the parties himself. But he has only his own day within which to do this, and not the day of the others; and he must therefore issue all his notices on the day after that of dishonor, unless there is no mail that day, or none that leaves or closes after business hours.

So it is with the other parties; each has his own time, and only that.<sup>(r)</sup> Thus, in the case above supposed, A is held, provided all the intermediate notices were duly given. But if he was notified personally only on Thursday by D, who received the notice on Tuesday, and should have sent it on Wednesday, A is not liable to any one. D is liable to the holder; but if the latter sues A on the ground that he was notified two days sooner than it was necessary that he should be, and earlier than he would have been had D notified C, and C B, and B A, a sufficient answer is, that this delay was the right of the others, and not the right of D.

If one party gives notice earlier than he is obliged to, this will not lengthen the time of any other party; or, in other words, the over diligence of one party is no excuse for the under diligence of another.<sup>(s)</sup> An agent, to whom a note or bill is indorsed for collection, has the same time within which to notify his principal, and the principal the prior parties, as if the agent were the real owner.<sup>(t)</sup>

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<sup>(r)</sup> *Rowe v. Tipper*, 13 C. B. 249, where the third indorser notified the second on the next business day after dishonor, and the first on the day subsequent to that. The second indorser gave no notice. Held that the first was not liable to the third. See *Dobree v. Eastwood*, 3 Car. & P. 250; *Simpson v. Turney*, 5 Humph. 419.

<sup>(s)</sup> *Turner v. Leech*, 4 B. & Ald. 451; *Smith v. Mullett*, 2 Camp. 208; *Carter v. Burley*, 9 N. H. 558; *Manchester Bank v. Fellows*, 8 Foster, 302; *Farmer v. Rand*, 16 Maine, 453; *Brown v. Ferguson*, 4 Leigh, 37; *Etting v. Schuylkill Bank*, 2 Penn. State, 355.

<sup>(t)</sup> *Bray v. Hadwen*, 5 M. & S. 68; *Daly v. Slater*, 4 Car. & P. 200; *Robson v. Bennett*, 2 Taunt. 388; *Langdale v. Trimmer*, 15 East, 291; *Firth v. Thrush*, 8 B. & C. 387; *Scott v. Lifford*, 9 East, 347, 1 Camp. 246; *Haynes v. Birks*, 2 Bos. & P. 599; *Ogden v. Dobbin*, 2 Hall, 112; *Bank of the United States v. Davis*, 2 Hill, 451; *Crocker v. Getchell*, 23 Maine, 392; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Foster v. McDonald*, 3 Ala. 34; *Gindrat v. Mechanics' Bank of Augusta*, 7 id. 324; *Hill v. Planters' Bank*, 3 Humph. 670; *Grand Gulf R. & B. Co. v. Barnes*, 14 Rob. La.

No one is required to give notice on Sunday, *(u)* or any well-established holiday. *(v)* If such day intervenes, it is not counted, but adds one more day of allowable delay. Thus, if a notice is received on Saturday, it need not be forwarded until by some mail on Monday, leaving or closing after business hours commence, or if there be no mail, by the next one; and this is so even if there is a Sunday mail. *(w)*

It has been held, that, although notice is received on Sunday, the party receiving is not obliged to transmit it before Tuesday, because he is not bound to open the letter on Sunday, and it is to be considered as received on Monday. *(x)* It has also been held that a party may if he pleases forward a notice on a holiday. *(y)*

Although a notice need not be forwarded before the day after dishonor, or its reception, still there is no reason why it may not be transmitted on that very day, after due presentment and demand. *(z)* In some States, as we have seen, suit may be

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127; *Colt v. Noble*, 5 Mass. 167; *Church v. Barlow*, 9 Pick. 547; *Bank of the United States v. Goddard*, 5 Mason, 366. See *Talbot v. Clark*, 8 Pick. 51. The same rule applies to the several branch banks of the same establishment. *Clode v. Bayley*, 12 M. & W. 51.

*(u)* *Haynes v. Birks*, 3 Bos. & P. 559; *Jameson v. Swinton*, 2 Camp. 373, 2 Taunt. 224; *Poole v. Dicus*, 1 Bing. N. C. 649; *Jackson v. Richards*, 2 Caines, 343; *Williams v. Matthews*, 3 Cowen, 252; *Eagle Bank v. Chapin*, 3 Pick. 180; *Seventh Ward Bank v. Hanrick*, 2 Story, 416; *Agnew v. Bank of Gettysburg*, 2 Harris & G. 478; *Burckmyer v. Whiteford*, 6 Gill, 1. See *Triplett v. Hunt*, 3 Dana, 126; *Etting v. Schuylkill Bank*, 2 Penn. State, 355; *Jones v. Wardell*, 6 Watts & S. 399.

*(v)* *Cuyler v. Stevens*, 4 Wend. 566, where the third day of grace was July 4th. In *Lindo v. Unsworth*, 2 Camp. 602, the bill was dishonored on Saturday. Monday was a Jewish festival. The plaintiff, a Jew, gave notice to the indorser on Tuesday, and the latter was charged. See also *Martin v. Ingersoll*, 8 Pick. 1.

*(w)* *Howard v. Ives*, 1 Hill, 263, where the mail closed Saturday at 3 P. M. There were two mails on Sunday and two on Monday, one of which closed early in the morning and the other in the afternoon. Notice sent by the last mail was held sufficient.

*(x)* *Wright v. Shawcross*, 2 B. & Ald. 501, note. See *Bray v. Hadwen*, 5 Maule & S. 68; *Deblioux v. Bullard*, 1 Rob. La. 66.

*(y)* *Deblioux v. Bullard*, 1 Rob. La. 66, where it was given on the 4th of July; *Martin, J.* said it might be given on Sunday.

*(z)* *Bussard v. Levering*, 6 Wheat. 102, where the notice was given on Saturday, Sunday being the third day of grace; *Lindenberger v. Beall*, id. 104; *Corp v. M'Comb*, 1 Johns. Cas. 328; *Thorpe v. Peck*, 28 Vt. 127, where the note was payable at a bank, and notice was given before the close of banking hours; *Smith v. Little*, 10 N. H. 526; *Manchester Bank v. Fellows*, 8 Foster, 302; *Coleman v. Carpenter*, 9 Penn. State, 178; *Lawson v. Farmers' Bank*, 1 Ohio State, 206; *Haslett v. Ehrick*, 1 Nott & McC. 116, where the maker was notified by the bank where the note was, that it was in their



commenced on the day of dishonor; but in such case it is necessary to send the notice to, or to notify the party to be charged, before the commencement of the action.(a) But there are decisions to the effect that no suit can be commenced on that day, and some that it cannot be brought before the time when it may be supposed that, by the regular course of the mail, the party to be charged has received the notice.(b)

If notice is given too soon, it is of no avail. In Massachusetts it is held, that where a note is neither payable at a bank nor put in a bank for collection, notice to the indorser immediately after the close of bank hours, no demand having been made on the maker, is invalid.(c)

The burden of proving due notice is upon the plaintiff,(d) whose duty it is to give it in a way capable of proof. It should also be proved distinctly. Thus, if the witness says the notice was sent in two or three days, and two are enough, but three not, and there is nothing to define this testimony, it will not be sufficient evidence to find a verdict for the plaintiff.(e)

It has been held to be sufficient for any indorser to show that the indorser whom he wishes to hold received the notice as soon as he would have received it had all the subsequent indorsers used the period of time to which they are severally entitled, and

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hands, and requesting him to "please have it settled by 9 o'clock to-morrow, and prevent its being returned for protest" After business hours the notice was sent to the indorser, the note being still unpaid, and the indorser was held. *Curry v. Bank of Mobile*, 8 Port. Ala. 360; *Crenshaw v. M'Kiernan*, Minor, 295; *McClane v. Fitch*, 4 B. Mon. 599. See *Stivers v. Prentice*, 3 id. 461; *Burbridge v. Manners*, 3 Camp. 193; *Ex parte Moline*, 19 Ves. 216, 1 Rose, 303; *Hartley v. Case*, 1 Car. & P. 555, 4 B. & C. 339; Lord *Alvanley*, C. J., *Haynes v. Birks*, 3 Bos. & P. 599, 602; *Bayley, J.*, *Cocks v. Masterman*, 9 B. & C. 902, 909. In *Leftley v. Mills*, 4 T. R. 170, Lord *Kenyon* expressed an opinion that the maker or acceptor could not be considered in default until the next day, leaving the whole of the last day to pay in; but *Buller, J.* expressed an opinion to the contrary.

(a) *Supra*, p. 411.

(b) *Supra*, p. 411.

(c) *Pierce v. Cate*, 12 Cush. 190. See also *Pinkham v. Macy*, 9 Met. 174.

(d) In *Halsey v. Salmon*, Penning. 667, the demand was set out in the declaration, and the fact that the defendant had notice thereof, but did not state any time. Held insufficient. In *Sussex Bank v. Baldwin*, 2 Harrison, 487, the plaintiff's witness testified that he mailed the notice, but could not tell when. Held insufficient evidence to prove notice. So *Warren v. Gilman*, 15 Maine, 70; *Lockwood v. Crawford*, 18 Conn. 361, where the only evidence was the fact that the holder, being an inmate of the defendant's family, informed him of the dishonor.

(e) *Lawson v. Shiffner*, 1 Stark. 314.



taking into consideration the time necessarily occupied by the usual course of the mail between their respective places of business or of residence,<sup>(f)</sup> and that it will then be open to the defendant to prove that any of these parties delayed trans-

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(f) In *Marsh v. Maxwell*, 2 Camp. 210, note, "Lord *Ellenborough* ruled, that, upon the dishonor of a bill, it is enough that the drawer or indorser receives notice in as many days as there are subsequent indorsers, unless it is shown that each indorser gave notice within a day after receiving it; as if any one has been beyond the day, the drawer and prior indorsers are discharged." In *Etting v. Schuylkill Bank*, 2 Penn. State, 355, the third indorser sued the second. The first three indorsers lived in Philadelphia, the fourth in New York, the fifth in Newark, N. J. The place of payment was Elizabethtown. The note was due Oct. 4th. Oct. 6th was Sunday. The defendant received notice Oct. 8th. This is all the evidence reported. The court said that the notice was in sufficient time, though the case turned upon another point. *Gibson*, C. J. said: "The general rule is, that when notice is given by the holder directly, it is soon enough if it reach the particular indorser as soon as it would have reached him circuitously through the subsequent indorsers, each of whom are entitled to an entire day, if he chose to insist on it, to hand it on; the only limitation to which is stated in *Marsh v. Maxwell*, 2 Camp. 210, note, by Lord *Ellenborough*. . . . . In other words, that there shall not be a longer link in the chain than the space of a single day; and that the holder shall not affect the indorser with notice after he has been discharged from liability to the subsequent indorsers. In this case there was no evidence of circuitous notice, and a day was properly allowed for each intervening party." In *Jones v. Wardell*, 6 Watts & S. 399, the drawer lived in Philadelphia, and the payee and first indorser in New York. The second indorser was the Bank of Syracuse, by which the bill was indorsed to the Bank of Rochester, which was the place of payment. The bill was protested December 28th. On January 3d the notice was mailed to Philadelphia, where it arrived on January 4th. Sunday intervened. This is all the evidence reported on this point, and the court held that the evidence was sufficient to sustain a verdict in favor of the first indorser against the drawer. *Rogers*, J. said: "By whom, or in what manner, or to whom it was transmitted to the city of New York, or by whom it was mailed to Philadelphia, does not appear. The supposition is, that the business was transacted in the usual course; that is to say, that the notice of protest was sent to the Syracuse Bank, by them to the payee in New York, by whom it was sent by mail to the drawer, who resides in Philadelphia. The Bank of Rochester, to whom it was sent for collection, in the absence of all information to the contrary, had a right to suppose that the parties to the bill lived in New York; it would, therefore, be unreasonable to require that the notice should be sent direct to the drawer, and this explains the reason of the direction which the notice took. As a matter of law, therefore, we incline to the opinion that this was a reasonable notice of the dishonor of the bill; for, allowing one day to each of the parties to the bill, and one day for Sunday, which was an intervening day, greater diligence could not reasonably be required, when it is remembered that Rochester is four hundred miles from New York, and consequently five hundred from Philadelphia, where the drawer resided." One difficulty in the above cases is the want of evidence as to the course of the mails and the time necessarily occupied in their transmission from one place to another; or, in other words, it may perhaps be objected, that the court cannot judicially take cognizance of the time thus occupied, without any proof. Thus, in *Carter v. Burley*, 9 N. H. 558, a suit by the second indorser against the first, the third indorser lived in New York, the second in Boston, and

mitting the notice beyond the time the law allows, which will, in accordance with the rules already laid down, be a good defence.(g)

We think that evidence should be adduced by the plaintiff to show the time occupied by the mail between the places, as it is difficult to see how the court can take judicial cognizance of it. Perhaps the proposition should be further qualified by requiring the plaintiff to prove that he transmitted the notice to his prior indorser, or to the one whom he wished to hold, within the requisite time, thus clearing himself at least of all imputation of neglect or laches.(h)

This question may also be important with reference to the point whether notice was put into the post-office in season to go by the mail of the next day after dishonor, or the reception of the notice. It would seem to follow, from the cases which we have already cited,(i) that it will be sufficient to prove that the notice was in each case deposited before business hours of the next day, because the plaintiff would by this show that he had done all that was required of him.(j) But if the only evidence was, that it was deposited after business hours of that day commenced, then it would seem necessary at least to show that there was no mail between the commencement of business hours and the time of depositing the notice in the office.(k) We have

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the third in New Hampshire. The note was protested in Philadelphia, October 4th. The agent of the third indorser received on October 8th or 9th a notice from his principal, dated October 6th, and notified the plaintiff the same day, who also notified the defendant on that day. A verdict for the plaintiff was set aside. *Parker*, C. J. said: "There is no evidence in this case of the course of the mails, nor does it appear whether there was a party at Philadelphia, nor at what time or in what manner notice was sent from that place, nor when it was received by Hutchinson in New York. The objection on this part of the case is well taken, and for this reason the case must be sent to a new trial." This case does not appear to conflict with the proposition in the text. It proceeded mainly upon the ground that there was no evidence as to the time occupied by the mails, a fact of which the court could not take judicial cognizance. There was also a greater length of time than could be reasonably accounted for between the day of protest and October 9th.

(g) *Supra*, p. 000.

(h) But this does not seem to have been adverted to in the cases cited *supra*, p. 516, note f; although in both cases it appeared that the plaintiffs transmitted their notices within their time.

(i) *Supra*, p. 511, note l.

(j) See *Commercial Bank v. King*, 3 Rob. La. 243, *supra*, p. 512, note a.

(k) *Seventh Ward Bank v. Hanrick*, 2 Story, 416; *Burgess v. Vreeland*, 4 N. J. 71; *Downs v. Planters' Bank*, 1 Smedes & M. 261; *Beckwith v. Smith*, 22 Main., 125

already seen,(*l*) that, in order to charge an indorser of a note payable on demand, presentment must be made within a reasonable time. But if, after such presentment, the note is dishonored, there is no good reason why the same rules as to the time within which notice is to be forwarded to the indorser should not apply, as in the case of other notes and bills.(*m*)

We have also seen (*n*) that a note or bill in which no time of payment is specified is to be considered as payable on demand. We should say in this case also that notice should be given within the same time as in other cases.(*o*)

It has already been remarked,(*p*) that a note indorsed when overdue is by the best authorities considered equivalent to a note or bill on demand, though some cases hold that the same strict rules are not to be applied. It has been said that the holder has a reasonable time after presentment within which to notify the indorser, and that this reasonable time may be so long as two months,(*q*) and an opinion has been expressed that no notice at all is necessary.(*r*) To maintain these views would seem to be

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For the facts of these cases, see *supra*, p. 512, note *o*. In *Moore v. Burr*, 14 Ark. 230, the notary's deposition stated that the notice was deposited in the post-office on the next business day after dishonor, "in time to go by the first mail thereafter." Held insufficient to charge the defendant, because there was no proof that it was deposited in time to go by the first convenient mail, if any, of that day.

(*l*) *Supra*, p. 263, *et seq.*

(*m*) In *Field v. Nickerson*, 13 Mass. 131, part of the instruction of the judge at Nisi Prius was, that "immediate notice" was requisite. Held correct. No objection to the charge on this point appears to have been raised by counsel or adverted to by the court. In *Seaver v. Lincoln*, 21 Pick 267, *Shaw*, C. J. said: "Demand being made on the makers at Fall River, notice to the indorser, at the distance of twenty-four miles, on the succeeding day, was within due time." It is laid down in the following cases that the same rule applies as to giving notice. *Lord v. Chadbourne*, 8 Greenl. 198; *Perry v. Green*, 4 Harrison, 61; *Lockwood v. Crawford*, 18 Conn. 361. In *Nash v. Harrington*, 2 Aikens, 9, *Hutchinson*, J. said, that the notice ought to have been given the day of the demand, the parties living near each other, in the same village.

(*n*) *Supra*, p. 381.

(*o*) *Brenzer v. Wightman*, 7 Watts & S. 264.

(*p*) *Supra*, p. 381.

(*q*) *Savage*, C. J., *Van Hoesen v. Van Alstyne*, 3 Wend. 75. This opinion is commented upon, and its correctness denied, by *Church*, C. J., in *Lockwood v. Crawford*, 18 Conn. 361.

(*r*) *O'Neill*, J., *Gray v. Bell*, 3 Rich. 71, *supra*, p. 381, note *j*. See *Bank of North America v. Barriere*, 1 Yeates, 360. In the following cases it is said that the same strict rules as to notice do not apply. *Duncan*, J., *M'Kinney v. Crawford*, 8 S. & R. 351; *Hall v. Smith*, 1 Bay, 330; *Rugely v. Davidson*, 4 Const. R. 33; *Brock v. Thompson*, 1 Bailey, 322, where three demands appear to have been made, and

introducing unnecessary distinctions, and in our opinion the notice should be transmitted as soon in the case of such notes and bills as of any others.(s)

If the analogy between notes and bills on demand, and those indorsed when overdue, and notes and bills payable at sight, is to be carried out, the same notice of dishonor would certainly be requisite, for no distinction that we are aware of has ever been attempted to be drawn between the time necessary in forwarding notice to an indorser of a bill at sight, and one in which there is a fixed time for payment.

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notice given only of the last. A verdict for the plaintiff was sustained. In *Chadwick v. Jeffers*, 1 Rich. 397, it is said that the duty of the holder as to notice, in such cases, is limited to the use of such diligence that the indorser suffers no injury through his neglect. Knowledge by the indorser that the maker was sued, at or immediately after the commencement of the action, was held sufficient notice, in *Benton v. Gibson*, 1 Hill. S. Car. 56; *Chadwick v. Jeffers*, 1 Rich. 397; *Gray v. Bell*, 3 id. 71, 2 id. 67. In the last case the writs were served simultaneously, and it was contended that there could be no such knowledge. But the court held the evidence sufficient to sustain a verdict for the plaintiff

(s) It is said, in the following cases, that the same rules applied. *Berry v. Robinson*, 9 Johns. 121; *Bishop v. Dexter*, 2 Conn. 419; *Ecfert v. Des Coudres*, 3 Const. R. 69; *Course v. Shackelford*, 2 Nott & McC. 283. In these cases there had been neither demand nor notice. In *Poole v. Tolleson*, 1 McCord, 199, there had been a demand, but no notice, and the indorser was discharged. *Richardson, J.* expressly said, that immediate notice should have been given, as in any other case. See his remarks, cited *supra*, p. 382, note *m*. In *Rice v. Wesson*, 11 Met. 400, the holder made a demand some time before he was obliged to, in the opinion of the court, and two weeks afterwards made another. He gave notice of the last demand only. The court discharged the indorser for the neglect to notify him of the first demand.

## CHAPTER XIII. ✕

## OF EXCUSES FOR WANT OF NOTICE.

It may be doubted whether any branch of commercial law, somewhat narrow in itself, exhibits so large a number of cases, and so boundless a variety in their facts and the conclusions from them, as those which relate to the subject of this chapter. It is not easy to imagine any circumstance attending non-notice which in some form or other is not urged as an excuse for it. And the decisions of the courts permit authorities to be cited on both sides of almost every question.

In our endeavor to present the law on this subject with whatever distinctness may be possible, we shall be aided by some previous general considerations as to the kinds and classes of these excuses. Some of them are so peculiar, that it is difficult to arrange them in company with any others, or to bring them under any general head. We may, however, on the whole, place all these excuses (all which have passed under adjudication, whether they have been deemed sufficient or otherwise) in four broad divisions.

The first of these is the excuse arising from the entire absence of necessity or utility, because the party who should receive the notice must know the facts as well as the party who should give it. If, for example, A draws on himself, payable to himself, and then accepts, and then indorses, a holder need not first demand of him as drawee, and then notify him of non-payment as drawer, and then notify him again as indorser. And we shall see in what way and to what extent this principle is applied, not where a person can be proved to have had knowledge in fact, for it is certain that this is no excuse for the want of regular notice, but where the person must of necessity have the knowledge by presumption of law, as where a firm draws upon itself, or where some member or members of a firm draw on the firm.

The next excuse is actual impossibility. The ground of this is, that the law lays upon no man an *impossible* duty. But this impossibility may arise from some circumstance, such as the death of the party, which excuses delay only, and not entire want of notice; or from some obstruction which may be temporary only, as war, sickness, or tempest, which excuses delay or entire want of notice, according to the circumstances of the case; or the utter inability to find the party to be notified, or his house or place of business, which is a complete excuse, unless it is removed by the efforts which the law requires, and then it will be seen to excuse delay only. Perhaps the questions presented by insolvency, and by the recurrence of days in which the law forbids labor or permits idleness, may best be considered under this head.

These two classes of excuses are far less frequent than the third, which is grounded on the fact that the party to be notified had no right whatever to draw or to indorse, and could not, by acting in his own wrong, acquire any right against others.

The fourth and last class of excuses consists of those which allege a waiver. The ground on which all excuses of this class rest is, that the right to require notice may of course be given up, and that it has been, in the case in question, voluntarily abandoned and renounced; and that this has been done expressly, or by circumstances which mean and imply this waiver.

All of these classes of excuses we shall now proceed to consider, and shall endeavor to illustrate the rules of law respecting them by a copious citation of authorities, and shall close this chapter with some general remarks on the subject of it.

## SECTION I.

## OF EXCUSES FOR NON-NOTICE, GROUNDED ON THE NECESSARY KNOWLEDGE BY THE PARTY TO BE NOTIFIED.

It has been held, that where a note is made by one firm and indorsed by another, and one of the partners of the indorsing firm is also a partner of the making firm, demand is necessary,<sup>(t)</sup> and by a reasonable implication notice might be here necessary.<sup>(u)</sup>

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(t) *Dwight v. Scovil*, 2 Conn. 654. *Swift*, C. J. said: "The circumstance that one of the defendants was a member of both the companies who made and indorsed the note can make no difference; for each company is to be considered as distinct persons, with different funds and liabilities; and there is the same reason for presentment and demand as if the companies were wholly different. If the companies should reside in different and distant places, the drawing of bills on each other might be convenient in the course of their business; but, on the principle contended for, the company drawing the bill might be subjected to pay it, because one of the partners belonged to both companies when the company on which it was drawn was solvent, and would have paid the bill if it had been presented. It is said that notice to one partner is notice to all; and that here one of the defendants knew that the note was not paid. It is true that one of the defendants must, in legal consideration, have known that the note was not paid; but he equally well knew that the note, when it became due, had not been presented to the makers, and payment demanded; he knew the fact that exonerated the defendants from all liability on their indorsement to pay the note, and it would be strange logic to say that this knowledge rendered the defendants liable."

(u) But the point may still, however, be considered as an open one. In *West Branch Bank v. Fulmer*, 3 Penn. State, 399, the note was made by one firm and indorsed by another. All the indorsers were partners in the firm which made the note, which firm had two additional members. No notice to the indorsers was held necessary. *Gibson*, C. J. said: "As to the liability of the indorsers, it is enough that it was decided in *Porthouse v. Parker*, 1 Camp. 82, in an action by the payee of a bill against the drawers, that, as the acceptor also happened to be a drawer, there was no necessity for notice to him, because the fact of dishonor was known to him; and that the knowledge of one was the knowledge of all. Now, putting the makers in this case in the place of their equivalent, the acceptor, in that, we find that the principle of the decision covers the whole of our case; and it is fortified by *Taylor v. Young*, 3 Watts, 339, in which it was recognized, and by *Gowan v. Jackson*, 20 Johns. 176, in which it was reasserted. But it is argued, that, though *Cochran & Perry* were liable as makers, notice to them as indorsers was requisite to make them liable as such. . . . . If, however, the use of notice is to give a drawer or indorser a seasonable opportunity to arrange his affairs with the acceptor or maker, it must be as available in its consequences when it is given to him in the one character as when it is given to him in the other. The principle of *Porthouse v. Parker* is, that knowledge is notice; and the effect of it is, that knowledge of the one firm was the knowledge of the other. It would be absurd in an indorser to complain that he had not been served with formal notice of what was known to him, or that he was prejudiced for want of it. As, then, it was as much the business of *Cochran & Perry* as it was the business of the other members of the firm of *Beers, Cochran, & Co.* to provide for the payment of their joint



But where a partner draws upon a firm of which he is a member, he is not entitled to notice; (*v*) nor, it would seem, where drawers draw on their own firm, which has other members, although it would be otherwise if the bill were drawn after a dissolution. (*w*)

note at its maturity, and as they all knew that provision had not been made for it, proof of notice to Cochran & Perry would have been superfluous in an action against them as indorsers." It may well be doubted whether any valid distinction can be made on this point between the case where the two firms contain one common member, and where they contain more than one.

(*v*) *Rhett v. Poe*, 2 How. 457, where the bill had been accepted. *Fuller v. Hooper*, 3 Gray, 334, where the bill was not accepted. So *Gowan v. Jackson*, 20 Johns. 176. See *Porthouse v. Parker*, 1 Camp. 82. In this case the bill was drawn by an agent of George, James, and John Parker upon John Parker, and accepted by an agent of the latter. The head note of the case states that the drawers were a firm. This case is cited by Byles on Bills, p. 223, as authority that notice to one of two or more parties jointly liable is sufficient. This is true, as has been said, so far as relates to partners, but incorrect with reference to other joint parties.

(*w*) In *Taylor v. Young*, 3 Watts, 339, the bill was drawn by James Taylor & Co. on the Pittsburg Iron Co., in favor of S. K. Page & Co. The drawers, drawees, and S. K. Page were partners. The bill was dated Aug. 27th, and payable on demand. The drawers had dissolved their connection with the drawees on Aug. 12th, which was published in a newspaper of that date of which the holder was a subscriber. Notice to the drawer was held necessary. *Gibson, C. J.* said: "It is argued, however, that, as regards the holder, the drawers are to be considered as a partner firm of the house on which the bill was drawn, and that presentment or notice was unnecessary, on the principle of *Porthouse v. Parker*, 1 Camp. 82, in which notice was ruled to be superfluous where the bill is drawn by several on one of themselves, since the acceptor, being likewise a drawer, is necessarily apprised of the material facts, and the knowledge of one partner is the knowledge of all; the converse of which was determined in *Gowan v. Jackson*, 20 Johns. 176, and would be our case if the drawer here had been a member of the general firm when the bill was drawn. But the fact is, it had retired, — notice of its retirement was published on the 12th of Aug., and the bill was drawn on the 27th. To this, it is said, the fact of withdrawal may not have been known to the holder when he took the bill. But of what importance is his ignorance? It is said he may have been induced to omit presentment and notice of non-payment by a belief that a continuation of the relation in which the parties once avowedly stood had rendered such a measure unnecessary. Would a reasonable belief, founded on a notorious course of dealing between the parties, that the drawer had not funds in the hands of the drawee, be equivalent to the actual fact, and operate as a dispensation from the duty of presentment and notice? Of collateral facts like these the party must judge at his peril. In analogy to the revocation of an agent's authority, notice of the dissolution of a partnership is necessary where the outgoing partner holds himself out to the world as the representative of the firm, and attempts to bind it, but not where he acts professedly and exclusively for himself. In respect to the first, the firm is bound for a supineness which, in trade, is equivalent to fraud in not apprising the public of the cessation of a relation which enabled each partner to contract for the whole. But in a transaction where the outgoing partner professed to treat, not for the firm, but for himself, it is not easy to perceive how the misconception of a fact that did not enter into the terms of the contract can dispense with any of its incidents, or give the party dealing with him an advantage against him."

The question of notice of the dissolution might perhaps here be important.(x)

It has also been held, that notice must be given to the indorser when one member of a firm makes a note and another member is indorser, both parties signing in their own name, and not in the name of the firm, although the note was given for goods purchased for partnership purposes, and to be paid for by partnership funds.(y)

## SECTION II.

### OF EXCUSES FOR NON-NOTICE, GROUNDED ON IMPOSSIBILITY OF NOTICE.

WE have seen that the death of the maker is no excuse for non-demand,(a) and, for a still stronger reason, it cannot be an excuse for non-notice.(b) So, as it is no excuse for non-demand that the indorser has been appointed administrator of the maker's estate,(c) it is also no excuse for non-notice.(d)

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(x) The remarks of *Gibson*, C. J., cited *supra*, note *w*, were *obiter*, as notice may perhaps have been brought home sufficiently to the holder; also, as the learned judge remarked, the bill having been received from the payee after maturity, the holder was bound by the obligations of the payee at the time of indorsement, and the latter was well aware of the dissolution.

(y) *Foland v. Boyd*, 23 Penn. State, 476, where one of the partners refused to sign the note as maker, but consented to indorse it. *Knox*, J. dissented. *Lowrie*, J., delivering the opinion of the court, said: "We discover no substitute for notice, and no excuse for its omission; and such was the view taken elsewhere in a very similar case, *Morris v. Husson*, 4 Sandf. 93. This is not like the cases where a note has copartners for the makers, and some of them for indorsers; and where, of course, the knowledge of the dishonor by the makers is chargeable on them as indorsers. This suit is upon the note, a contract by which the maker and indorser stand severally and not jointly related to the plaintiff, the duties of each being different; and it cannot at all be said that one is liable for the other, except according to the contract, or that one is chargeable with the knowledge of the breach of contract of the other. Though they were partners in the original purchase, that does not confound this contract so as to allow a demand to be made of the indorser, and notice to the maker, or no notice or demand at all, which is really the effect of what is claimed here."

(a) *Supra*, p. 445.

(b) *Price v. Young*, 1 Nott & McC. 438; *Gower v. Moore*, 25 Maine, 16, where the maker's estate was insolvent, and this was known to the indorser. So where the demand on the maker's administrator is unnecessary, because the latter is not liable by statute, until after a certain period, notice should be given. See *Hale v. Burr*, 12 Mass. 86.

(c) *Supra*, p. 445, note *l*.

(d) *Juniata Bank v. Hale*, 16 S. & R. 157. It is not clear from the case what kind

But it cannot be deemed certain what will constitute notice in such a case. It may be inferred, perhaps, from some authorities, that a demand on the indorser as administrator, and a notice to him as indorser, are necessary to charge him as indorser.(e) But it is not easy to see why a proper demand on him, with a due presentment of the note, does not necessarily contain all the essential elements of a regular notice. And it would appear to be superfluous, if not absurd, to require the holder to say, when the demand was ineffectual, "Take notice that this bill has been dishonored by you." The only ground for the requirement can be, that the indorser must be told that he is looked to personally for the payment of the note of the deceased.(f)

Where the indorser is dead, notice must be sent to his executor or administrator; and if no person has been appointed, or it cannot be ascertained by the use of due diligence who or where he or they who have been appointed can be found, notice must be forwarded to the last place of residence of the deceased.(g) Hence the death of the indorser is no excuse for neglect to give notice.(h) Even although the administrator is not liable for any debts due from the deceased for a certain period,(i) still he must

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of a demand was made. The statement of the case says that the note was protested, but no notice was given to the indorsers. The reasons for the decision appear mainly to be that it is well settled that knowledge is not notice. *Groth v. Gyger*, 31 Penn. State, 271. In this case the note was presented at the banking-house of the plaintiffs, but it does not appear whether the note was payable there or not.

(e) See *Magruder v. Union Bank*, 3 Pet. 87, 7 id. 287. The head note of the valuable edition of the reports of the Supreme Court by Mr. Justice Curtis is in nearly the same language as the text. Perhaps also the same doctrine may be inferred from *Juniata Bank v. Hale*, 16 S. & R. 157.

(f) *Caunt v. Thompson*, 7 C. B. 400, where the holder went to the acceptor's house on the day the bill matured, and there saw the drawer, to whom he showed the bill, and said, "I have brought a bill from Caunt's; you know what it is." The drawer said, in reply, "I am executor of W. (the acceptor); you must persuade Caunt to let the bill stand over a few days, because W. (the acceptor) has only been dead a few days. I shall see the bill paid." This was held sufficient notice to the drawer. Nothing appears to have been said about a waiver of notice.

(g) *Supra*, p. 501.

(h) See the cases cited *supra*, p. 501.

(i) *Oriental Bank v. Blake*, 22 Pick. 206, where *Putnam, J.* said: "But it does not follow, that, because to charge an indorser no demand is necessary to be made on the administrator of the maker of a note or the acceptor of a bill of exchange falling due within the year after the appointment, notice of the dishonor of the bill is not necessary to be given to the administrator of the indorser, in a reasonable time. He stands in the place of the indorser; and a want of notice of the dishonor of the bill may be

have notice, because he may at once, on receiving it, take measures for obtaining indemnity.

Where the maker or acceptor cannot by the use of due diligence be found, nor his last and usual place of business, no demand on him is necessary to charge an indorser.<sup>(j)</sup> But the difficulty or impossibility of making a demand of the acceptor or maker is no excuse whatever for non-demand of the indorser, or non-notice to him. It is possible that a brief delay in making demand and giving notice to an indorser might be excused by the fact that the holder was during that delay diligently employed in searching for the maker or acceptor. We should regard this, however, as extremely doubtful, and a prudent holder would, in such a case, give the notice at once, and at the regular time.

But the excuse would certainly be sufficient where the indorser could not be found; and a delay of notice for several days has been excused on proof that the holder was unable to find the indorser.<sup>(k)</sup> If, however, after due diligence, the indorser cannot

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prejudicial to all persons interested in the estate of his intestate. He, for example, may have paid to the party liable to him upon the bill money which he might have retained, or have otherwise omitted to obtain security against the undertaking of his intestate. . . . . Payment by the administrator of the acceptor, at the maturity of the bill, within the year, could not be enforced by legal process. The law will presume that a demand of payment under such circumstances would be fruitless. It would be useful to the administrator of the acceptor, but would not be of any benefit to the indorser. Whereas, a notice to the administrator of the indorser of the non-acceptance or non-payment of the bill is of vital importance, inasmuch as it would enable him to take immediate measures against the parties liable to him, for the security of the estate of his intestate. Now while, on the one hand, to charge an indorser, the law will not require the holder to make a vain demand on the acceptor, it will not, on the other hand, excuse him for neglecting to give essential notice. And we are all of opinion that the case at bar falls within the latter position. The reasonable notice which would have been required to be given to the indorser is quite as necessary to be given to his executor or administrator."

(j) *Supra*, p. 448, note d.

(k) In *Bateman v. Joseph*, 2 Camp. 461, 12 East, 433, there was a delay of three days, which was excused for this reason. Lord *Ellenborough*, 2 Camp. 461, said: "When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice of the dishonor of the bill, within the usage and custom of merchants." In *Baldwin v. Richardson*, 1 B. & C. 245, a delay of nine days was excused. So in *Firth v. Thrush*, 8 B. & C. 387, 2 Man. & R. 359, where there was a delay of more than two months. *Browning v. Kin-*

ne found, nor his last and usual place of abode or of business, no notice can be necessary, because it is impossible. (*l*)

When the maker has absconded, some authorities regard this fact as a sufficient excuse for non-demand, while others hold that reasonable endeavors should be used to find his last place of residence or business. (*m*) But notice should certainly be given to the indorser. (*n*)

Where the drawer or indorser has himself absconded, notice should be given to some person who represents the estate, or who is a member of his family; or perhaps at his last usual place of residence. (*o*)

As the indorser may require that due demand should be made on the maker, although the indorser knew the maker's insolvency at the time of the indorsement, (*p*) the same rule would apply with still greater reason to the question of notice to an indorser. We should say, therefore, that the maker's insolvency would furnish no excuse for want of notice to an indorser; (*q*) but the

near, Gow, 81, where there was a delay of one day. *Sturges v. Derrick*, Wightw. 76, where there was a delay of four months.

(*l*) In *Beveridge v. Burgis*, 3 Camp. 262, Lord *Ellenborough* said: "Ignorance of the indorser's residence may excuse the want of due notice, but the party must show that he used reasonable diligence to find it out." *Hunt v. Maybee*, 3 Seld. 266.

(*m*) *Supra*, pp. 449, 450.

(*n*) See *May v. Coffin*, 4 Mass. 341, *infra*, note *q*.

(*o*) See *Ex parte Rohde*, Mont. & M. 430; *Ex parte Johnston*, 1 Mont. & A 622, 630.

(*p*) *Supra*, p. 446, note *r*.

(*q*) *Nicholson v. Gouthit*, 2 H. Bl. 609, *infra*, p. 529, note *r*. *Thackray v. Blackett*, 3 Camp. 164, where the defendant, a drawer, was aware of the insolvency of the acceptor before maturity, and knew the bill would not be paid. *Whitfield v. Savage*, 2 Bos. & P. 277, where the bill was drawn by the defendant for the accommodation of an indorser. *Clegg v. Cotton*, 3 id. 239, where the defendant had drawn on his principal, and hearing of his being likely to fail, deposited effects of the principal in the hands of an indorser. *Esdale v. Sowerby*, 11 East, 114, where the insolvency of the acceptor and the bankruptcy of the drawer were known to the defendant, an indorser, nearly a month before the bill matured. See *Smith v. Becket*, 13 East, 187, where the maker of a note had become bankrupt. So *Ex parte Wilson*, 11 Ves. 410. So *Boulton v. Stubbs*, 18 id. 20. See *Bowes v. Howe*, 5 Taunt. 30, 16 East, 112; *May v. Coffin*, 4 Mass. 341, where the indorser was held entitled to notice of non-acceptance, although the drawer had become insolvent and had absconded; *Parsons, C. J.*, *Bond v. Farnham*, 5 Mass. 170; *Crossen v. Hutchinson*, 9 id. 205; *Sandford v. Dillaway*, 10 id. 52, where the indorser was aware, at the time of indorsing, of the maker's insolvency; *Farnum v. Fowle*, 12 id. 89, where the maker was notoriously insolvent six months before the note was made, and so continued until after maturity; *Shaw v. Reed*, 12 Pick. 132; *Granite Bank v. Ayers*, 16 id. 392; *Shaw, C. J.*,

authorities are not in unison on this point.(r) So also, where the

*Lee Bank v. Spencer*, 6 Met. 308; *Mead v. Small*, 2 Greenl. 207; *Groton v. Dallheim*, 6 id. 476; *Hunt v. Wadleigh*, 26 Maine, 271, where the insolvency of the acceptor was known to the indorser when he made his indorsement; *Buck v. Cotton*, 2 Conn. 126, where the defendant indorsed for accommodation of the maker, knowing his insolvency: *Holland v. Turner*, 10 id. 308; *Jackson v. Richards*, 2 Caines, 343; *Bruce v. Lytle*, 13 Barb. 163, where the defendant, an indorser, was a clerk in the maker's store before the note was made and after its maturity; *Benedict v. Caffé*, 5 Duer, 226; *Barton v. Baker*, 1 S. & R. 334, where the indorser was aware of the insolvency of the maker when the note was made; *Nash v. Harrington*, 2 Aikens, 9; *Duncan, J., Gibbs v. Cannon*, 9 S. & R. 198, 201, 16 id. 261; *Orear v. McDonald*, 9 Gill, 350; *Walton v. Watson*, 13 Mart. La. 347; *Edwards v. Thayer*, 2 Bay, 217; *Jervey v. Wilbur*, 1 Bailey, 453, where the indorser knew of the insolvency of the maker before the note matured. So *Allwood v. Haseldon*, 2 id. 457; *Course v. Shackelford*, 2 Nott & McC. 283; *Kiddell v. Ford*, 2 Const. R. 678, 3 Brev. 178; *Hightower v. Ivy*, 2 Port. Ala. 308, where the indorser was aware of the maker's insolvency; *Pons v. Kelly*, 2 Hayw. 45; *Denny v. Palmer*, 5 Ired. 610.

(r) In *De Berdt v. Atkinson*, 2 H. Bl. 336, *supra*, the opinion of Lord C. J. Eyre proceeded upon the ground that the insolvency of the maker, known to the indorser when he indorsed the note for the maker's accommodation, was a good excuse for want of notice. The learned judge said: "But consider on what ground an early demand is in general required. It is because if any delay takes place, the effects may be gone out of the hands of the acceptor; and if the holder chooses to wait, he does it at his own risk. But apply this rule to the case of known insolvency, what does it signify to the person who is liable in the second stage at what time the demand is made on the drawer, who was known to be insolvent from the beginning? General rules are established for general convenience, and I agree that, if the drawer is not known to be insolvent, the fact of insolvency will not excuse the want of an early demand; but the fact of knowledge excludes all the presumptions that would otherwise arise. Then as to notice, and the application for payment to the defendant, what did it signify to him when that application was made? It could make no difference to him whether it were made on one day or another; he meant to guarantee the payment of the note, and there was no possibility of any loss happening to him from the want of notice. In this instance, therefore, the general rule fails in its application." *Buller, J.* remarked: "It is said that the insolvency of the drawer does not take away the necessity of notice; that is true where value has been given, but no further." *Heath and Rooke, JJ.* simply concurred. It is remarkable, that within two years after this decision the same court appear to have decided directly contrary in *Nicholson v. Gouthit*, 2 H. Bl. 609, Lord C. J. Eyre, delivering the opinion of the court, and *Heath and Rooke, JJ.* concurring. *Buller, J.* does not appear to have been present. No notice was taken of the former case by either counsel or court. In the first case the indorser indorsed without having received any consideration, and aware of the maker's insolvency. In the latter, the maker being insolvent, the indorser undertook to guarantee a debt due from the maker to a third party, by indorsing his note as a security for the debt. The first case, however, must be considered as overruled by the latter, and has been frequently doubted. In *Allwood v. Haseldon*, 2 Bailey, 457, *Johnson, J.* said, that "it is not law, either in this country or in England." So *Swift, C. J., Hosmer and Gould, JJ., Buck v. Cotton*, 2 Conn. 126; *Nelson, J., Mechanics' Bank v. Griswold*, 7 Wend. 165, 169. In *Jackson v. Richards*, 2 Caines, 343, *Kent, C. J.* said: "It has been laid down in the case of *De Berdt v. Atkinson*, 2 H. Bl. 336, that the payee of a promissory note (*supra*, p. 528,



maker dies leaving his estate insolvent, not only must demand be made,(s) but notice must be given.(t)

As the loss of a bill can be no excuse for want of presentment and demand, so it can be none for want of notice.(u)

It is a sufficient excuse for not forwarding the notice on the regular day, that it was Sunday, or some other legal holiday,(v) and the same doctrine has been said to extend to Saturday, where the holder was a Jew.(w) We have stated on a previous page the various holidays sanctioned by usage, by statute, or by com-

note q), indorsing it to give it currency, and knowing of the insolvency of the maker at the time of such indorsement, cannot insist on the want of demand and notice; because he was not an indorser in the common course of business, and cannot be affected by the want of notice. The same point was afterwards ruled by *Buller, J.*, at *Nisi Prius*, in *Corney v. Da Costa*, 1 Esp. 302. But within two years subsequent to the first decision the same court decided directly the contrary in the case of *Nicholson v. Gouthit*, 2 H. Bl. 609. I think the reasoning in the last decision the best, and ought to be followed." The case of *Corney v. Da Costa*, 1 Esp. 302, is, however, distinguishable, as will be seen subsequently. It would appear from the case of *Ex parte Solarte*, 2 Deac. & C. 261, that the court considered the bankruptcy of the drawer before maturity was a sufficient excuse for want of notice to him, the acceptor having also become bankrupt. But *Erskine, C. J.*, in *Ex parte Johnston*, 1 Mont. & A. 622, 626, said that the reason for the decision in the former case was, that, under the circumstances, the assignees were precluded from setting up the want of notice as a defence, because they had not adverted to the objection in any of their affidavits, nor was it taken when before the commissioner, but urged for the first time in argument before the court. In *Clark v. Minton*, cited 2 Const. R. 680, 682, it was held that the recorded insolvency of the maker under the insolvent acts, before maturity, was a sufficient excuse for want of notice to the indorser. This case is reported 2 Brev. 185. See also *Kiddell v. Peronneau*, cited id. 188. In *Bogy v. Keil*, 1 Misso. 743, *Wash, J.* said: "Nothing but the maker's insolvency at the time of indorsing his note, or some such circumstances as show that the indorser did not rely upon the maker's liability or punctuality, or had no right to rely upon payment by the maker, will, in the opinion of this court, dispense with the necessity of giving the indorser notice." In *M'Clellan v. Clarke*, 2 Brev. 106, where the indorser knew, when he indorsed, that the maker had absconded, and was insolvent, no notice was held necessary. In *Stothart v. Parker*, 1 Overt. 260, where the insolvency was known to the indorser when he indorsed, no notice was held necessary.

(s) *Supra*, p. 447, note u.

(t) *Johnson v. Harth*, 1 Bailey, 482; *Gower v. Moore*, 25 Maine, 16; *Lawrence v. Langley*, 14 N. H. 70, where one maker had become bankrupt before maturity, and the other had died insolvent. But in *Davis v. Francisco*, 11 Misso. 572, notice was held not necessary to an indorser of a note over due, he being aware that the maker had died insolvent. *Scott, J.* dissenting.

(u) *Infra*, Vol. II. p. 261.

(v) *Supra*, p. 515.

(w) In *Lindo v. Unsworth*, 2 Camp. 602, Lord *Ellenborough* said: "The law merchant respects the religion of different people"



mon law,(*x*) and also that notices should be sent on the next succeeding business day, because the holidays are not counted at all.(*y*)

Where a note is indorsed at so short a period before it will be due, and the indorser knows that a demand on the maker is impossible by reason of the distance at which he lives from the place at which the indorsement was made, a reasonable delay in demanding the note would probably be excused as to that indorser.(*z*)

And where a joint note has been indorsed, and the makers live so far apart that a presentment and demand on both on the day of maturity is impossible, the same excuse would apply to the same extent.(*a*) In both of these cases, which might almost be considered as coming under the law of waiver, we should say that notice need not be given until after a regular and legal demand could be made. But we have no positive authority for this.

A delay of some days has been excused by the fact that the notice was taken from the post-office by a person of the same name with him for whom it was intended.(*b*)

Among the circumstances which have been considered as constituting a sufficient excuse for want of notice, or rather for a delay of notice, are,(*c*) the prevalence of a malignant disease, which rendered it dangerous to enter the infected district,(*d*) and

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(*x*) *Supra*, pp. 400 - 403.

(*y*) *Supra*, p. 515.

(*z*) There must, however, in this as in other cases, be due diligence. See *Anderton v. Beck*, 16 East, 248, and *Boehm v. Sterling*, 7 T. R. 423. In France, an indorser transferring a bill so late as to make regular notice impracticable, cannot take advantage of it, but prior indorsers and the drawer may. *Pardessus*, 451.

(*a*) *Supra*, p. 363.

(*b*) *Jones v. Wardell*, 6 Watts & S. 399.

(*c*) *Hopkirk v. Page*, 2 Brock. C. C. 20. See *U. S. v. Barker*, 4 Wash. C. C. 464, 12 Wheat. 559, 1 Paine, C. C. 156. See *Patience v. Townley*, 2 J. P. Smith, 223.

(*d*) *Tunno v. Lague*, 2 Johns. Cas. 1. *Contra*, *Roosevelt v. Woodhull*, Anthon, 35. In this case the notice for the plaintiff arrived in New York some time in September. The plaintiff had left the city on account of an epidemic which then prevailed, and on his return, in October, found the protested bill under the door of his office. He had left no one in charge of his business, nor had he placed there any notification of the place to which he had removed. He sent the notice to the defendant immediately after its discovery. *Van Ness, J.* nonsuited him. This matter is now regulated by statute in New York, by which parties leaving their place of business within the infected district are required to register their names and the places to which they may wish their notices to be sent; otherwise it will be sufficient for the party notifying to deposit the notice in the post-office.

a violent tempest, which has so obstructed the roads as to render travelling over them impossible. Among the circumstances offered as an excuse, but held to be insufficient, is the dangerous illness of an indorser's wife.(e)

It must always be remembered, that the excuse of impossibility, on whatever facts it may rest, continues only so long as the impossibility continues. That is, if a party bound to give notice gives none, because he cannot give it at the regular time, but can give notice at a subsequent period within which the notice may possibly be of use, he is bound to give it then. In other words, the excuse of an impossibility which is not permanent is only an excuse for a delay until the impossibility is removed.(f)

### SECTION III.

#### EXCUSES FOR NON-NOTICE, GROUNDED ON THE ABSENCE OF RIGHT IN ANY PARTY TO REQUIRE NOTICE.

THE most usual and important excuse for want of notice, on this ground, arises in the case of bills being drawn without there being any funds belonging to the drawers in the hands of the parties upon whom the bills are drawn. We propose to consider, also, in this place, how far this fact operates as an excuse for the absence of proper presentment.

In the first and leading case on this subject, decided by the Court of King's Bench in the year 1786, it was held, that when

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(e) *Turner v. Leach*, Chit. Bills, 452, an action by the eleventh indorser against the eighth. The notice was duly left, on Sept. 4th, at the house of the tenth indorser, who, in consequence of the dangerous illness of his wife at a distant place, had left his house, on Sept. 1st, in charge of a boy, who had no authority to open letters, and intending to return on Sept. 3d. Owing to the extreme illness of his wife, he did not return until Sept. 8th, when the notice was duly forwarded to the plaintiff, who took up the bill, and then sued the defendant, who insisted upon a discharge on the ground of laches in forwarding the notice. It was urged for the plaintiff, that the dangerous sickness of the prior indorser's wife excused his absence from home and the delay in giving notice of the dishonor; and that, as the dishonor is contrary to the contract and the expectation of the parties, there is no reason for requiring an indorser to be in the way, or to appoint an agent, in his absence, to provide for such an event. But Lord *Ellenborough* ruled that these circumstances constituted no excuse for the delay in giving notice. This case is reported, but not on this point, in 4 B. & Ald. 451.

(f) *Beale v. Parrish*, 20 N. Y. 407.

the drawer has no effects in the hands of the drawee, no notice of dishonor is necessary. (g) The reason given for this decision by one of the judges (h) is, that the drawing under such circumstances is a fraud on the part of the drawer, and deprives him of the usual right to notice. The reason given by another judge (i) is, that the drawer cannot possibly be injured by want of notice, and that he has no right to draw or to expect payment.

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(g) *Bickerdike v. Bollman*, 1 T. R. 405. The drawer was indebted to the drawee, in this case, to a large amount. The bill was due Oct. 18th, and presented on that day for payment, and no notice of the refusal was given. The bill does not appear to have been accepted. This case is affirmed and recognized in *Goodall v. Dolley*, 1 T. R. 712, and *Rogers v. Stevens*, 2 id. 713. The question was raised in *Gale v. Walsh*, 5 id. 239.

(h) *Bickerdike v. Bollman*, 1 T. R. 405, *Ashhurst, J.*, who said: "As to the general rule, it has never been disputed that the want of notice to the drawer, after the dishonor of a bill, is tantamount to payment by him; but that rule is not without exceptions, and particularly in the case mentioned by the plaintiff's counsel, that notice is not necessary to be given where the drawer has no effects in the hands of the drawee, for it is a fraud in itself, and if that can be proved, the notice may be dispensed with." Fraud was also said to be the reason of the rule laid down in *Bickerdike v. Bollman*, by Lord *Alvanley, C. J.*; *Chambre and Heath, JJ.*, in *Clegg v. Cotton*, 3 Bos. & P. 239; *Hosmer, J.*, *Buck v. Cotton*, 2 Conn. 126; *Sharkey, C. J.*, *Cook v. Martin*, 5 Smedes & M. 379; *Swan, J.*, *Miser v. Trovinger*, 7 Ohio State, 281. Mr. Wallace, in his note in 2 Smith L. C. 22, says that fraud is the "reason and limit of the exception." He also says that all the cases in which demand and notice are not requisite to charge the drawer or indorser are cases of fraud. But this is clearly incorrect, for we shall have occasion to mention excuses which have nothing whatever to do with fraud.

(i) *Bickerdike v. Bollman*, 1 T. R. 405, *Buller, J.*, who said: "On the second trial of the cause of *Tindal v. Brown*, 1 T. R. 167, before me at Guildhall, the jury told me they found their verdict for the plaintiff, on the ground that it had not appeared from the evidence that any injury had arisen to the party from want of notice. In consequence of which, upon the subsequent trial, I told the jury that, where a bill was accepted, it was *prima facie* evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to the court, they thought that, if there were no effects in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt. The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice. Soon after I sat on this bench, I tried a cause at Guildhall, on a bill of exchange, which was either drawn or accepted by a person residing in Holland; and a full special jury, under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonored; because he had no effects in the hands of the person on whom the bill was drawn. That verdict never was objected to; and if it be proved on

It has been the subject of frequent regret on the part of many eminent English judges, *(j)* that the rule requiring strict notice in all cases was ever infringed upon; and while recognizing the authority of the original case, they have declared that it is not to be extended. *(k)*

In fact, it has been remarked, that in their desire to confine the operation of the exception within the smallest practicable limit,

the part of the plaintiff, that, from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him, and to accept payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonored." Absence of the possibility of injury is given as the reason for the exception by *Buller, J.*, in *Goodall v. Dolley*, 1 T. R. 712, 714; *Lord Ellenborough, C. J.*, *Legge v. Thorpe*, 2 Camp. 310; *Blackhan v. Doren*, 2 id. 503; *Lord Denman, C. J.*, *Terry v. Parker*, 6 A. & E. 502; *Thompson, J.*, *Hoffman v. Smith*, 1 Caines, 157; *Boyle, C. J.*, *Ralston v. Bullitts*, 3 Bibb, 261, 263; *Dorsey, J.*, *Eichelberger v. Finley*, 7 Harris & J. 381, *infra*, p. 535, note *l*.

*(j)* *Lord Ellenborough, C. J.*, *Blackhan v. Doren*, 2 Camp. 503; *Legge v. Thorpe*, id. 310; *Orr v. Maginnis*, 7 East, 359, where he said that it had been regretted by "a very learned person who was counsel for the plaintiff in that case." This was said to refer to *Chambre, J.*, in 7 East, 362, note *a*, and to *Lord Eldon*, in 12 id. 173, note *d*. *Chambre* was counsel for the plaintiffs, as appears by the report of the case, 1 T. R. 406. *Le Blanc, J.*, *Claridge v. Dalton*, 4 Maule & S. 226; *Abbott, C. J.*, *Cory v. Scott*, 3 B. & Ald. 619; *Lord Alvanley, C. J.*, *Clegg v. Cotton*, 3 Bos. & P. 239; *Bosanquet, J.*, *Lafitte v. Slatter*, 6 Bing. 623; *Lord Tindal, C. J.*, id., who said it was "an excepted case"; *Parke, B.*, *Carter v. Flower*, 16 M. & W. 743, 748. So also *Lewis, C. J.*, *Case v. Morris*, 31 Penn. State, 100, 104. In *Ex parte Heath*, 2 Ves. & B. 240, *Lord Eldon* said: "I have often lamented the consequences of the distinction, introduced in modern times, as to the necessity of giving notice of the non-payment or non-acceptance of a bill of exchange, whether the acceptor had or had not effects; and I have the satisfaction of finding that my opinion has been adopted by the courts of law. According to the old rule, a bill of exchange, purporting upon the face of it to be for value received, the implication of law from the acceptance was, that the acceptor had effects. Then they came to this general doctrine, that it is not necessary for the holder to give notice, if he can show that the acceptor had no effects. The first objection is, who is to decide whether there are effects or not? In the simple case, where there is nothing but that particular bill, and no other dealing between them, there is no difficulty; but if there are complicated engagements, and various accommodation transactions, no one can say whether there are effects or not."

*(k)* *Lord Ellenborough, C. J.*, in *Thackray v. Blackett*, 3 Camp. 164, said: "Judges of great authority have doubted the propriety of the rule laid down in *Bickerdike v. Bollman*, and I certainly will not give it any extension." So in *Orr v. Maginnis*, 7 East, 359, the same judge said: "I shall anxiously resist the further extension of the exception." And in *Rucker v. Hiller*, 16 East, 43: "I know the opinion of my Lord Chancellor Eldon to be, that the doctrine of that case ought not to be pushed further." So *Parke, B.*, *Carter v. Flower*, 16 M. & W. 743, 748; *Lewis, C. J.*, *Case v. Morris*, 31 Penn. State, 100, 104.

they have frittered it away until there is but little of it left; and the reasons upon which they rest in their decisions are so various and unsatisfactory, that it is a task of no inconsiderable difficulty to extract from them any certain rule of law by which this class of cases may be readily distinguished.<sup>(1)</sup>

The true test, in our opinion, in each case, is this: Had the drawer, under the circumstances of the case, a right to draw? This depends upon the fact whether he had a reasonable ground to expect that the bill would be honored, or not. If he had such reason to expect it to be honored, he is entitled to a regular presentment, and notice of refusal to accept to pay; and if not so entitled, he cannot complain either for negligence in

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(1) *Dorsey, J.*, *Eichelberger v. Finley*, 7 Harris & J. 381, who, after referring to the discrepancy in the reasons as given by the English judges, and stating that the cases of *Legge v. Thorpe*, 12 East, 171, 2 Camp. 310, and *Claridge v. Dalton*, 4 Maule & S. 226, are inconsistent with the reason of fraud, as "the conduct of the defendants, in those cases, is free from the slightest imputation of fraud," continues: "The true rationale of the rule introduced in *Bickerdike v. Bollman* is that given by *Buller, J.*, 'that the drawer could not be injured by the want of notice.' Why not injured by the want of notice? Because the object of notice is to let the drawer know that his bill has been dishonored, and this he already knew from the nature of the circumstances connected with it. To require a party to be notified of a fact of which he has already a perfect knowledge does appear to be a solecism not at all in harmony with the beautiful system of reasoning and good sense which pervades every branch of legal science. The many distinguished judges who have disapproved of this rule, in expressing their regrets at its introduction, correctly state it to be 'the substitution of knowledge for notice'; and yet, when called upon to apply the principle to the facts in each particular case, such has been the anxiety to limit the extent of its application, such the desire to ingraft upon it restrictions and discriminations by which future cases may evade its operation, that in subtilties and refinements the essence and meaning of the rule has been almost wholly lost sight of. Of this, the case of *Orr v. Maginnis*, 7 East, 359, is a memorable illustration." We doubt whether the true reason is here stated. The drawer cannot certainly know that the bill may be dishonored, for some one might accept for his honor, or for that of the drawee. This is as good a reason as that given for not considering the holder excused from making a due presentment where the indorser was aware when he put his name upon a note that the maker was hopelessly insolvent; which is, as we have already seen, that some of his friends may provide him with the means to take up the note. Also, because it is well settled, as will appear hereafter, that knowledge of dishonor not obtained by a party who has a right to give notice is not equivalent to notice. It is also doubtful whether the absence of any possibility of injury is the proper reason. Because, according to what would seem to be the opinions of some judges, even if a drawer, without funds, who has no reason nor right to expect that the bill will be honored, can prove actual injury, he may be discharged by neglect in making demand and in giving notice; which could not be true unless there was still some possibility of injury. But what we consider to be the reason for objecting to the doctrine laid down here is, that we doubt, as will presently appear, whether the fact that the drawer has been injured, under such circumstances, would avail him.

presenting and in forwarding notice, or for an entire neglect to do either.(m)

The "reasonable grounds" required by law are not such as would excite an idle hope, a wild expectation, or a remote probability,

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(m) In *French v. Bank of Columbia*, 4 Cranch, 141, *Marshall*, C. J. said: "Notice must immediately be given to the drawer that his bill is dishonored by the drawee, because he is presumed to have effects in the hands of the drawee, in consequence of which the drawee ought to pay the bill, and that he may sustain an injury by acting on the presumption that the bill is actually paid. The law requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury, which may result from the laches of the holder of the bill. To this security, then, it would seem the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule. A drawer who has no effects in the hands of the drawee is said to be without the reason of the rule, and therefore to form an exception to it. This has been laid down in the books as a positive qualification of the rule, but has seldom been so laid down, except in cases where, in point of fact, the drawer had no right to expect that his bill would be honored, and could sustain no injury by the neglect of the holder to give notice of its being dishonored. In reason, it would seem that in such cases only can the exception be admitted, and that the necessity of notice ought to be dispensed with only in those cases where notice must be unnecessary or immaterial to the drawer. The reasoning of the judges in most of the cases which have been cited would seem to warrant this restriction of the exception. The case of *Bickerlike v. Bollman*, 1 T. R. 405, was a bill drawn by a debtor on his creditor, without a single accompanying circumstance which could raise an expectation that the bill would be accepted or paid. Notice in this case was declared to be unnecessary. Justice Ashhurst gives as a reason for this opinion, that the drawing was in itself a fraud. This reason must be considered as additional to the general ground on which the case was placed in the argument, which was, that the want of notice could not possibly affect the drawer. The particular reason given by Justice Ashhurst for his opinion is clearly inapplicable to any case in which the drawer was justified in drawing. In the opinion of Justice Buller, some general reasoning is introduced, from which it is fairly deducible that he considered the drawer as having no right to expect that the bill would be paid, and as being liable to no injury from the want of notice, and that these were the true grounds of the exception." After reviewing the cases of *Goodall v. Dolley*, 1 T. R. 712, and *Rogers v. Stevens*, 2 id. 713, and stating that the reason given by Lord Kenyon in the latter was "because the drawer must know that he had no right to draw on the drawee," the learned judge continues: "It would seem to be the fair construction of these cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and therefore as not coming within the exception to the general rule. The transaction cannot be denominated a fraud, for in such case it is a fair commercial transaction. Neither can it be truly said that he had no right to expect his bill would be paid, for a person authorized to draw must expect his draft will be honored. Neither can it be said that he has virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true when at the time of drawing the drawer has no reason to expect that his bill will be paid. A person having a right to draw, and a fair right to expect that his bill



that the bill might be honored; but such as create a full expectation, and a strong probability, of its payment; such, indeed, as would induce a merchant of common prudence, and ordinary

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will be honored, would not come within the reason of the exception, and therefore, it may well be contended, ought not to be brought within the exception itself." The following cases, as to presentment, support the view that want of funds and absence of reasonable grounds to expect the honor of the bill constitute an excuse. *Terry v. Parker*, 6 A. & E. 502, 1 Nev. & P. 752, where the drawer was held, though presentment was not made to the drawee till two days after maturity. The bill was payable six months from date, and the presentment for acceptance and payment had probably become merged. *Parsons, C. J., Bond v. Farnham*, 5 Mass. 171; *Kinsley v. Robinson*, 21 Pick. 327, where the bill had been accepted, and a presentment ten days after maturity was excused; *Cowen, J., Harker v. Anderson*, 21 Wend. 372. See *Franklin v. Vanderpool*, 1 Hall, 78. In *Dollfus v. Frosch*, 1 Denio, 367, presentment for payment was made three days before maturity, and the drawer was held. The bill was "non-acceptable." In *Mobley v. Clark*, 28 Barb. 390, the drawer of a bill which had been duly presented for acceptance and accepted was held, although there was no presentment for payment. See *Wood v. Gibbs*, 35 Miss. 559, where a neglect to present a sight bill within a reasonable time was excused. The evidence of want of funds in this case was an admission of the fact by the drawer. See *Adams v. Darby*, 28 Misso. 162. But *Radcliff, J.*, in *Cruger v. Armstrong*, 3 Johns. Cas. 5, said: "The want of funds may excuse the want of notice of the non-payment, but it cannot be a reason to dispense with the presentment, or demand of payment. The drawee without funds might have paid it for the honor of the drawer." The same was held in *English v. Wall*, 12 Rob. La. 132, where the bill was protested prematurely, and the drawer was discharged. In the following cases the same rule was applied as regards notice of non-acceptance, there being no difference between the case of laches in giving notice, and that where no notice is given. *Dickins v. Beal*, 10 Pet. 572; *Baker v. Gallagher*, 1 Wash. C. C. 461; *Read v. Wilkinson*, 2 id. 514; *Warder v. Tucker*, 7 Mass. 449. See *Stanton v. Blossom*, 14 id. 116; *Van Wart v. Smith*, 1 Wend. 219; *Cowen, J., Commercial Bank v. Hughes*, 17 id. 94, 97; *Wollenweber v. Ketterlinus*, 17 Penn. State, 389; *Cathell v. Goodwin*, 1 Harris & G. 468; *Eichelberger v. Finley*, 7 Harris & J. 381; *Oliver v. Bank of Tennessee*, 11 Humph. 74; *Porter, J., Hill v. Martin*, 12 Mart. La. 177; *Benoist v. Creditors*, 18 La. 522; *Anderson v. Folger*, 11 La. Ann. 269; *Whaley v. Houston*, 12 id. 585; *Ralston v. Bullitts*, 3 Bibb, 261; *Farmers' Bank v. Vanmeter*, 4 Rand. Va. 553; *Hubble v. Fogartie*, 3 Rich. 413; *Durum v. Hendrick*, 4 Texas, 495. In the following cases the rule was applied with respect to notice of non-payment. *Rhett v. Poe*, 2 How. 457; *Hopkirk v. Page*, 2 Brock. 20; *Valk v. Simmons*, 4 Mason, 113; *Allen v. King*, 4 McLean, 128. See *Savage v. Merle*, 5 Pick. 83; *Hoffman v. Smith*, 1 Caines, 157; *Radcliff, J., Cruger v. Armstrong*, 3 Johns. Cas. 5; *Cowen, J., Commercial Bank v. Hughes*, 17 Wend. 94; *Dollfus v. Frosch*, 1 Denio, 367; *Mobley v. Clark*, 28 Barb. 390; *Case v. Morris*, 31 Penn. State, 100; *Archer, J., Clopper v. Union Bank*, 7 Harris & J. 92, 102; *Bloodgood v. Hawthorn*, 9 La. 124; *Benoist v. Creditors*, 18 id. 522; *Williams v. Brashear*, 19 id. 370, 16 id. 77; *English v. Wall*, 12 Rob. La. 132; *Gillespie v. Cammack*, 3 La. Ann. 248; *Whaley v. Houston*, 12 id. 585; *Blankenship v. Rogers*, 10 Ind. 333; *Miser v. Trovinger*, 7 Ohio State, 281; *Oliver v. Bank of Tennessee*, 11 Humph. 74; *Spear v. Atkinson*, 1 Ired. 262; *Cook v. Martin*, 5 Smedes & M. 479; *Armstrong v. Gay*, 1 Stew. Ala. 175; *Yongue v. Ruff*, 3 Strob. L. 311; *Boulager*



regard for his commercial credit, to draw a like bill.<sup>(n)</sup> The reasonableness of the expectation has been held to be ordinarily a question of law; but when the proof is contradictory, and the facts equivocal or contradictory, it is a mixed question of law and fact.<sup>(o)</sup> To apply this rule, the drawer may have a right to

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*v. Talleyrand*, 2 Esp. 550; Lord *Ellenborough*, *Rucker v. Hiller*, 16 East, 43, 3 Camp. 217; *Brown v. Maffey*, 15 East, 216; *Claridge v. Dalton*, 4 Maule & S. 226. See the cases cited, *supra*, p. 533, note *g*.

In the following cases no protest was held necessary. *Benoist v. Creditors*, 18 La. 522; *Legge v. Thorpe*, 12 East, 171, 2 Camp. 310. But this last case may perhaps be in opposition to the doctrine of the text, that the right to demand and notice depends upon the reasonableness of the expectation that the bill will be honored. The circumstances of the case were as follows: The bill was drawn in favor of the payee, because the drawer had, at the request of the drawees, who were executors, employed the payee to do some carpenter's work on a building which the drawer had rented of the deceased before his death, under an agreement that the rent reserved was to be laid out in certain improvements on the premises, the value of which had amounted to more than the rent. The bill was drawn in expectation that the executor would pay, he having assets. Lord *Ellenborough*, C. J. said, 12 East, 175: "The fact is, that the drawer was not altogether unwarranted, under the circumstances, in expecting that his bill might be honored, so that there is no imputation upon him for having drawn the bill." This case may, however, be explained by the fact that the improvements agreed to be made by the drawer in lieu of paying rent covered the expenses incurred on the building, on account of which the bill was drawn, that is, that the carpenter's work on the building was part of the improvements which the drawer agreed to make. This fact does not appear clearly from the case, as reported in *East*, from which we have taken the above circumstances. In the report in *Campbell*, all that appears is the fact that the drawee testified that he had no funds of the drawer, and that the latter had no right to expect that, upon any consideration, the bill would be accepted and paid. It may perhaps be that the drawer acted as the drawee's agent, and no notice was considered necessary, it being a bill drawn by a party upon himself. In *Foard v. Womack*, 2 Ala. 368, entire absence of funds, independent of the question of reasonable expectation, was held to be the test. See *Tarver v. Nance*, 5 id. 712; *Hill v. Norris*, 2 Stew. & P. 114.

(*n*) *Dorsay, J.*, *Cathell v. Goodwin*, 1 Harris & G. 468, 471; *Archer, J.*, *Orear v. McDonald*, 9 Gill, 350, 357. In *Armstrong v. Gay*, 1 Stew. Ala. 175, there seems to have been a chance that the drawee would have accepted and paid, but there was no sufficient ground for the drawer to expect it.

(*o*) *Cathell v. Goodwin*, 1 Harris & G. 468; *Orear v. McDonald*, 9 Gill, 350; *Wollenweber v. Ketterlinus*, 17 Penn. State, 389. In this case the draft was drawn on an agent whose principal was to receive a sum of money by contract for furnishing a certain quantity of maps within a specified time. The drawer, knowing the terms of the contract, agreed to perform a part of the work on the maps, but after considerable delay, finding himself unable to do the work, got the payee to do it, and drew the draft in his favor. Owing to the drawer's delay, the maps were not completed in time, and the principal was not entitled to receive any money under the contract. The draft was drawn for a greater sum than the agent was to receive. The judge charged that these facts, if believed, constituted an excuse for want of notice of non-acceptance to the drawer. Held correct.

expect that the bill will be honored, when there is a fluctuating balance between him and the drawee, although the balance may be against the former at the time presentment was made, *(p)* or where there are open accounts between the parties. *(q)*

But we do not think that presentment and notice would be necessary if it were proved that the drawer knew the state of the account when he drew, and made no provision for the honor of the bill before the time when it should in the regular course be presented; *(r)* because the evidence of open accounts and fluctuating balances would seem to be proof of a right to expect the honor of the bill, which might be rebutted by counter-proof of there being no reasonable grounds upon which to found such expectation. The same rule would also be applicable where, although there were open accounts between drawer and drawee, the accounts were in litigation, and that fact was known to the drawer at the time of drawing. *(s)* So also when consignments were made, but with an understanding that the bills were not to be accepted until after a certain period, and the bill was due prior to

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*(p)* *Blackhan v. Doren*, 2 Camp. 503, where the bill was for £250. The drawer had £1,500 in the hands of the drawee, but owed him £10,000, which the latter had appropriated. Notice was held necessary. If these were all the facts in the case, we should doubt the propriety of the decision. Lord *Ellenborough*, C. J., *Brown v. Maffey*, 15 East, 216. See *Bagnall v. Andrews*, 7 Bing. 217; *Orear v. McDonald*, 9 Gill, 350; *Baldwin, J., Dickens v. Beal*, 10 Pet. 572, 577; *Richardson, J., Sutcliffe v. M'Dowell*, 2 Nott & McC. 251, 256.

*(q)* *Hopkirk v. Page*, 2 Brock. 20; *Robinson v. Ames*, 20 Johns. 146; *Williams v. Brashear*, 19 La. 370, 16 id. 77. See *New Orleans Bank v. Harper*, 12 Rob. La. 231, 233; *Hill v. Norris*, 2 Stew. & P. 114; *Baldwin, J., Dickens v. Beal*, 10 Pet. 572, 577; *Frost, J., Yongue v. Ruff*, 3 Strob. 311; *Richardson, J., Adams v. Darby*, 28 Misso. 162.

*(r)* In *Hopkirk v. Page*, 2 Brock, 20, there had been several transactions prior to the time of drawing the bill between the drawer and the drawees. The drawees had acted as agents of the drawer in effecting the sale of an estate, and the sale of several consignments of tobacco. There was a mortgage on the estate sold, for which the vendee retained a considerable sum of money in his hands, and for which no claimant had for a long time appeared. There had been prior bills of the drawer on the drawees protested. For some time prior to drawing the bill in suit there had been no consignment of tobacco, and a letter from the drawer had been received by the drawee stating that it was feared that the representative of the mortgagee had been found, and that little could be expected therefrom, and it concluded by saying, that, as to "paying any more, or raising money on the uncertainty of the mortgage, we shall not attempt." There was a small balance due the drawee at the time the bill was drawn. Want of notice of non-payment was excused. So in *Dollfus v. Frosch*, 1 Denio, 367, there was an open account between the drawer and drawee, and the drawer was charged, although presentment was made three days before maturity and no notice given.

*(s)* *Dollfus v. Frosch*, 1 Denio, 367. See *Benoist v. Creditors*, 18 La. 522.

that time, these facts would constitute a sufficient excuse for want of notice.(*l*)

The drawer may likewise have good reason to believe that the bill will be honored, if he has consigned goods to the drawee,(*u*) although the consignment may, by accident or otherwise, not have come into the possession of the drawee,(*v*) or may, by depreciation in value or other loss, have become insufficient to cover the amount of the bill.(*w*)

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(*l*) *Claridge v. Dalton*, 4 Maule & S. 226, where the drawer had been in the habit of supplying the drawee with goods, and the latter to accept bills drawn on them, at the end of the year. At the time of drawing, the drawer had received an order for goods, and had forwarded them to the drawee, to the value of £270. The bill was for £300, and due Sept. 1. Notice was not given within due time, but the drawer was held. Lord *Ellenborough*, C. J., said: "I accede to the proposition, that where there are any funds in the hands of the drawee, so that the drawer has a right to expect, or even where there are not any funds, if the bill be drawn under such circumstances as may induce the drawer to entertain a reasonable expectation that the bill will be accepted and paid, the person so drawing it is entitled to notice. The question, therefore, is, whether in this instance there were any funds in hand at the time of drawing applicable to this bill, or a ground of reasonable expectation that when the bill became due the drawee would come forward and pay it. As to funds, though there were goods of the defendant in the drawee's hands at the time of drawing, yet they were not such as could be properly set against the drawing. And as to any reasonable expectation that the bill would be paid, it was neither accepted, nor had the defendant any claim upon the drawee to have it honored, according to the due course of credit between them, until the end of the year. At that time he would have been entitled to draw, whereas this bill, which is at two months, became due on the 1st of September; it was drawn, therefore, in anticipation of his credit, and without any assurance of accommodation. For if there never was any drawing between the parties but at the end of the year, or accepting of bills, how shall we say that the defendant was authorized to entertain a reasonable expectation that this bill would be honored? And if not, this falls within the rule laid down in *Bickordike v. Bollman*, and notice was not necessary."

(*u*) *Hopkirk v. Page*, 2 Brock. 20; *Orear v. McDonald*, 9 Gill, 350, where a bill was drawn for \$3,000, by authority of the drawee. The drawer advised the drawee of a consignment to meet it, and the latter accepted. The consignment subsequently received brought \$7,000. Other drafts had been drawn and accepted, and other consignments made, but at the maturity of the bill the acceptors had not sufficient funds to take it up, after payment of drafts subsequently drawn and accepted. A presentment two days after maturity was not excused. See *New Orleans Bank v. Harper*, 12 Rob. La. 231; *Lacoste v. Harper*, 3 La. Ann. 385; *Grosvenor v. Stone*, 8 Pick. 79; *Baldwin, J., Dickins v. Beal*, 10 Pet. 572, 577; *Frost, J., Yongue v. Ruff*, 3 Strob. 311, Lord *Ellenborough*, C. J., *Legge v. Thorpe*, 2 Camp. 310.

(*v*) See *Rucker v. Hiller*, 16 East, 43, *infra*, note *w*. *Eyre, C. J., Walwyn v. St. Quintin*, 1 Bos. & P. 652, 656; Lord *Ellenborough*, C. J., *Legge v. Thorpe*, 12 East 171, 175, *Oliver v. Bank of Tennessee*, 11 Humph. 74; *Baldwin, J., Dickins v. Beal*, 10 Pet. 572, 577; *Richardson, J., Sutcliffe v. M'Dowell*, 2 Nott & McC. 251, 256; *Edwards v. Moses*, *id.* 433.

(*w*) *Rucker v. Hiller*, 3 Camp. 217, 16 East. 43, where the ship conveying the consiga-

So the drawer may have good reason, in some cases, to expect that a third party will provide the drawee with funds with which to take up the bill.(x)

He has a right also to expect that the bill will be honored when the drawee has given him express authority to draw,(y) provided the bill be drawn within the due limits of the authority;(z) or where the bill is drawn under an engage-

ment had been detained, and the cargo so depreciated in value that it was hardly sufficient to pay the freight. Notice of non-acceptance was held necessary. In *Robins v. Gibson*, 3 Camp. 334, the bill was drawn on a consignment of hides and indigo. Before presentment for payment, the hides had been sold at a loss, and the indigo remained unsold. Notice of non-payment was held necessary. This is the state of the case, as appears from the report in Campbell. By the report in East, at the time of presentment, the cargo was on the way to the drawee, who had received neither bill of lading nor invoice, in consequence of which the refusal to accept was made. In *Robinson v. Ames*, 20 Johns. 146, the drawee had received considerable shipments of cotton from the drawer, and accepted other bills; but on account of a fall in the price of cotton, the value of the consignments was not equal to the amount of the accepted bills and the bill in suit. Notice of non-acceptance of the bill was held necessary. In *Williams v. Brashear*, 19 La. 370, 16 id. 77, the bill was drawn on molasses purchased by the drawee of the drawer, and the molasses had become lost by rain. The bill had been accepted. Notice of non-payment was held necessary.

(x) *Lafitte v. Slatter*, 6 Bing. 623, 4 Moore & P. 457, where the acceptor accepted at the request of a third party, who promised to take up the bill. Demand was made a fortnight after maturity, and no notice given. The drawer was discharged. In *French v. Bank of Columbia*, 4 Cranch, 141, *Marshall, C. J.*, after stating the rule with respect to want of funds, said: "This point came on again to be considered in the case of *Rogers v. Stevens*, 2 T. R. 713, in which, as between the drawer and drawee, there was no pretext of a right to draw. It was said that a third person had stated himself to have funds in the hands of the drawee, that the bill was really drawn on the credit of those funds, and that loss had been actually sustained from the want of notice. But these facts formed no part of the case. If they had, it is apparent that, in the opinions of Lord Kenyon and Justice Grose, they would have been decisive in favor of the necessity of notice, unless that necessity had been dispensed with by the subsequent conduct of the drawer." In *Walwyn v. St. Quintin*, 2 Esp. 515, the jury, under the direction of *Eyre, C. J.*, decided that where the indorser had supplied the drawee with effects, due notice of non-acceptance must be given to the drawer. The case was, however, overruled by the full court, in 1 Bos. & P. 652, but this latter case has virtually been overruled by *Scott v. Lifford*, 1 Camp. 246, 9 East, 347; *Cory v. Scott*, 3 B. & Ald. 619.

(y) *Austin v. Rodman*, 1 Hawks, 194, where a written authority was held to be a sufficient ground for drawing. See *Bloodgood v. Hawthorn*, 9 La. 124.

(z) In *Dickins v. Beal*, 10 Pet. 572. In this case the drawers had no funds in the hands of the drawees, nor had they made any consignments. Dickins and Taylor were partners, doing business at Hazelwood, Tenn., and drew two bills in favor of Beal, in payment of an antecedent debt due the latter by the drawers. The following letters to the cashier of the Branch Bank at Nashville were offered in evidence, and refused. "Messrs. Dickins and Taylor are authorized, in making negotiations, to value

ment between drawer and drawee; (a) or, perhaps, where the drawee has been in the habit of accepting independently of the state of accounts between them; (b) or where the drawee had

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on our house in New Orleans, for say \$ 10,000, in such form and at such time as they may think proper, and the same will be duly honored." "Our friend Colonel S. Dickins is authorized, in *negotiating with your institution*, to value on our house in New Orleans, at any time, for such sums as he may think proper, and same will be duly honored." The drawer was held, although there were laches in giving notice of non-acceptance. *Baldwin, J.* said: "It is clear that this transaction was not a negotiation, within the meaning or intention of these letters; they evidently referred to negotiations at the bank, or within the sphere of its operations in the commercial transactions of the firm; the one referring to Dickins alone was expressly limited to negotiations with that bank. The remittance of these bills to New Orleans in payment of an antecedent debt to the plaintiff was in no sense of the term a negotiation of them, and was so utterly inconsistent with the evident object of the letters, that the most remote expectation could not have been entertained that they would have been accepted. A mercantile house conducting operations at Memphis and New Orleans would, in the course of their business, lend their credit in anticipation of consignments, while they would refuse it to pay the debts due to other persons, these considerations could not escape the consideration of Dickins and Taylor, when they sought to make Wilcox and Feron their creditor, instead of Beal, by such a fraudulent abuse of the letters of credit. Had these bills come to the hands of an innocent holder in the course of trade, with a knowledge of these letters, the case would have been different; or if the bank had negotiated them, there would have been a reasonable expectation that they would have been honored; but Dickins and Taylor could have entertained no such expectation. The letters were, therefore, properly excluded." In *Orear v. McDonald*, 9 Gill, 350, the drawees had given the drawers a written authority to draw, and one bill prior to the one in suit appears to have been honored. *Martin, J.* said: "It is true that this authority was limited to three fourths of the market value of the cargo at New Orleans. With respect, however, to the first draft, this agreement was not strictly adhered to; and the argument is, we think, legitimate, that this fact was calculated to impress upon the minds of the drawers the belief that the drawees would deviate from the strict letter of their authority, if it became necessary for the honor of the bill."

(a) *Marshall, C. J.*, *French v. Bank of Columbia*, 4 Cranch, 141; *Eyre, C. J.*, *Walwyn v. St. Quintin*, 1 Bos. & P. 652; *Shaw, C. J.*, *Kinsley v. Robinson*, 21 Pick. 327; *Richardson, J.*, *Adams v. Darby*, 28 Misso. 162. A drawer without funds, whose agreement with the drawee is not conclusively shown to have authorized him to expect an acceptance, under the state of affairs brought about by the mode in which he disposed of his draft, is not, it would seem, entitled to notice of non-acceptance or non-payment. *Whaley v. Houston*, 12 La. Ann. 585.

(b) *Baldwin, J.*, *Dickins v. Beal*, 10 Pet. 572, 577; *Frost, J.*, *Yongue v. Ruff*, 3 Strob 311; *Richardson, J.*, *Adams v. Darby*, 28 Misso. 162. *Contra*, *Foard v. Womack*, 2 Ala. 368, where the defendant's counsel requested the court to instruct the jury, that if the drawees were in the habit of accepting for the drawer, and the latter had good reasons to believe they would accept the bill, he was entitled to notice of dishonor. The request was refused, the court telling the jury that a want of funds from the time of drawing to maturity constituted an excuse for want of notice. The jury found a verdict for the plaintiff, and the judgment was confirmed. This case is affirmed in *Tarver v. Nance*, 5 Ala. 712.

promised to accept; (c) or where the drawee has sufficient securities to cover the amount of whatever acceptance he might make.(d)

Where the drawee has funds in his hands at the time the bill was drawn, it will not be sufficient to defeat the right of the drawer to due notice of non-acceptance, to show that the effects were attached in the hands of the drawee prior to presentment for acceptance, because this fact will not show absence of a right to expect the honor of the bill.(e)

The fact that the drawee owes the drawer a sum of money as executor has been held not to give the drawer such a right to

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(c) See *Orear v. McDonald*, 9 Gill, 350. But the mere fact of an acceptance will not show a right to expect the honor of the bill, where absence of funds for the debt to the time of presentment for payment is shown, as will appear *infra*, p. 544, and notes. We should say, however, quite confidently, that a promise to accept will render notice of non-acceptance necessary.

(d) In *Spooner v. Gardiner*, Ryan & M. 84, the drawer had no effects in the hands of the acceptor from drawing till maturity, but the acceptor had received from the drawer, prior to the bill, several acceptances of the latter, on which money had been raised by the acceptor. Some of the acceptances had been returned dishonored, and others were outstanding, ten of which last were for a greater amount than that of the bill. The acceptances were accommodation acceptances for the drawer's benefit. The drawer was held entitled to due notice of non-payment. See *Campbell v. Pettingill*, 7 Greenl. 126, where the drawee, a treasurer of a corporation, accepted to pay when in funds of the corporation. The acceptor held its negotiable securities and other evidences of debt, to the amount of the bill, but no cash. The acceptor owed the drawer a small sum. An opinion was expressed that notice of non-payment was necessary. In *Van Wart v. Smith*, 1 Wend. 219, 227, the drawees held a guaranty of a third party for £ 10,000, to secure them for their acceptance. The drawee drew a bill for a larger amount. The drawees had never accepted any bill beyond that value, unless secured by other securities. There was no security for the bill in suit, and acceptance was refused. Laches in giving due notice of non-acceptance were excused. In *Walwyn v. St. Quintin*, 2 Esp. 515, the payee had lodged title-deeds of a house belonging to him with the drawee, for the purpose of raising money, but no money had been raised at the time the bill was payable. *Eyre*, C. J. left it to the jury to say whether this constituted effects in the drawee's hands, and the jury found that it did. It seems to have been so considered by the full court in 1 Bos. & P. 652. In *Ex parte Heath*, 2 Ves. & B. 240, Lord *Eldon*, after regretting the decision in *Bickerdike v. Bollman*, and the difficulties attendant upon it, said, with reference to this case: "There cannot be a stronger instance than that, in the case referred to, Lord Chief Justice *Eyre*, a very good lawyer, left it to the jury to decide, without any solution of the question, whether title-deeds are effects; but a rule that securities cannot be effects in any case would be quite destructive of all commercial dealing. Are not short bills, for instance, effects? Is it of no importance to the holder to have notice, that he may withdraw them from the possession of the acceptor?"

(e) *Stanton v. Blossom*, 14 Mass. 116.



draw in his own name as will entitle him to notice of non-payment. (f)

So where the draft was drawn on funds which were to be received under a contract, but which, by reason of the neglect of the drawer, or his failure to perform certain duties required, were not due under the contract, the drawer being aware of the terms thereof, no notice of non-acceptance was held necessary; because the drawer had no reasonable ground to expect the honor of the bill. (g) Where the drawer agreed with his lessor to make certain improvements upon an estate rented by him, and subsequently hired the payee to perform a part of the work, and then drew upon the lessor's executors in favor of the payee, to whom the draft was given in payment for the work, no protest for non-acceptance was held necessary. (h)

It seems to have been held that the mere fact of acceptance is sufficient proof of a right to draw, or a right to expect that the bill would be honored, although the drawer may have had no funds. (i) But this cannot always be true, inasmuch as in many cases the drawer has been held liable without due presentment for payment, (j) or notice of dishonor, (k) when the bill was accepted. The fact of acceptance may be some evidence of a right to draw where there are other facts tending to show that right,

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(f) *Yongue v. Ruff*, 3 Strob. 311.

(g) *Wollenweber v. Ketterlinus*, 17 Penn. State, 389, *supra*, p. 538, note o.

(h) *Legge v. Thorpe*, 12 East, 171, 2 Camp. 310. If this case was not decided upon the state of the facts as given in the text, or upon the ground that the drawer acted simply as the drawee's agent, we do not think it can be supported. See a statement of it, *supra*, p. 535, note l. Where A, being indebted to B, procured C, who was indebted to him, to draw a bill in his favor on B, which was indorsed over to B, in payment of the debt due B by A, it was held that C was not entitled to notice, no funds having been provided. *Stewart v. Desha*, 11 Ala. 844.

(i) *Pons v. Kelly*, 2 Hayw. 45. See *Richie v. McCoy*, 13 Smedes & M. 541, where it was held that proof of the want of effects on the day of maturity did not throw upon the defendant the burden of proving that he had reasonable grounds to believe that the bill would be paid on presentment; but the court seems to adopt the view, that the fact of acceptance is sufficient to shift the presumption. The rule, we think, is this: If the drawer had reasonable grounds to expect the payment of the bill, on presentment for payment, he is entitled to notice, and perhaps the fact of want of funds at maturity is sufficient, *prima facie*, to show an absence of reasonable grounds.

(j) *Kinsley v. Robinson*, 21 Pick. 327; *Mobley v. Clark*, 28 Barb. 390

(k) *Hoffman v. Smith*, 1 Caines, 157, where it is said by *Thompson, J.*, "The acceptance by the drawee made no alteration in the rule"; *Allen v. King*, 4 McLean, 128; *Valk v. Simmons*, 4 Mason, 113; *Rhett v. Poe*, 2 How. 457. In these last two cases the funds were withdrawn. *Gillespie v. Cammack*, 3 La. Ann. 248.



and may go to support it; (l) but the cases above cited are authorities against the view that the acceptance itself is sufficient proof to establish the right to draw, and to rebut the presumption of the absence of such right, arising from proof of absence of effects from drawing to maturity, or a withdrawal of them before presentment for payment.

It has been held, that the fact that the drawer and acceptor had no funds at the place where the bill was drawn payable, and no reasonable expectation of having any there, was not a sufficient excuse for want of notice to the drawer; (m) because the drawer might have drawn on funds which the acceptor had neglected to place in the bank.

It seems to have been held, that the mere fact that the drawee has some funds, however small in amount or little in value, will

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(l) In *Campbell v. Pettingill*, 7 Greenl. 126, *Weston*, J. said: "There is certainly ground to contend that the defendants had reasonable expectations that their order would be accepted [paid?], of which its actual acceptance and partial payment might be regarded as evidence." In this case the question was whether notice of non-payment was necessary. So *Martin*, J., in *Orear v. McDonald*, 9 Gill, 350, 358, said: "This promise may be regarded as equivalent to an acceptance of the draft. It has been urged, however, on the authority of *Hoffman v. Smith*, 1 Caines. 157, that the acceptance of the bill does not render notice of non-payment necessary in a case where there were no funds. This may be true, but all must agree that, on the question whether the drawers had a right to expect that their draft would be honored, it is a fact of the most commanding character. It rests on the plain proposition, that the drawers could not presume that the drawees would violate or evade their express engagement. And as a circumstance calculated to generate in the minds of the drawers the belief that their draft would be paid, it may be considered as conclusive, unless mitigated or explained." In *Hill v. Norris*, 2 Stew. & P. 114, 124, *Lipscomb*, J. said: "The fact of the existence of a running account between two men engaged in business, and the acceptance of a bill by one of them for the other, affords a twofold ground of presuming the drawer believed the bill would be honored; the fact of their accounts being unclosed is one, and the acceptance is the other. Indeed, it is difficult to arrive at the conclusion that the drawer did not feel himself authorized to draw, if the bill has been accepted." An acceptance may be made under the belief, or the promise, that the drawer will put the acceptor in funds, which if he fail to do, no notice is requisite. *Rhett v. Poe*, 2 How. 457, where the funds were withdrawn, after acceptance, under such an agreement. *Gillespie v. Cammack*, 3 La. Ann. 248. In *English v. Wall*, 12 Rob. La. 132, where the bill was drawn, waiving acceptance, under such a promise.

(m) *Harwood v. Jarvis*, 5 Sneed, 375. *Sed quære*. As against the drawer, the holder was bound to make a demand at the place specified, and a demand on the acceptor at any other place would have been unavailing. So it might appear that want of funds at the only place where demand could have been made, and no reasonable expectation of any there, would be a sufficient excuse

entitle the drawer to notice.(n) The grounds on which this must rest are, that the excuse of want of funds is to be construed strictly, and not to be extended; and also the difficulty of examining the state of the accounts in each case to ascertain what and on which side the balance lies; or the fact that the drawer may be subject to injury by the loss of some of his funds.(o) But it

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(n) *Thackray v. Blackett*, 3 Camp. 164. In this case, when two bills were drawn, the drawer had no effects in the hands of the acceptors, but before the maturity of either, the acceptors owed him an amount less than one of the bills. Held, that the drawer was entitled to notice of non-payment. Lord *Ellenborough*, C. J. said: "The excuse of want of effects in the acceptors' hands, I think, is equally unavailing as to both bills. I cannot make any distinction between the law. If there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills became due, I cannot say that he must necessarily have been aware beforehand that either of them would be dishonored." See *Blackhan v. Doren*, 2 Camp. 503, cited *supra*, p. 539, note p. In *Hill v. Norris*, 2 Stew. & P. 114, the judge charged the jury that, although there was a small balance, yet if the latter was too inconsiderable to induce a reasonable expectation that the bill would be paid, no notice of non-payment need be given to the drawer. This charge was held incorrect, and the judgment for the defendant reversed. It will be seen that the bill had been accepted. In *Lacoste v. Harper*, 3 La. Ann. 385, the bill was for \$2,777, and the amount of funds, \$883. *Slidell*, J. said: "We are not aware of any authority extending the exemption of the necessity of notice to cases where the drawee had funds in his hands at the maturity of the bill. Even if the funds be insufficient to cover the bill, the drawer is entitled to notice of dishonor." In *Wollenweber v. Ketterlinus*, 17 Penn. State, 389, 399, *Coulter*, J. said: "If the drawer has any funds in the hands of the drawee, no matter whether they be sufficient to meet the draft or not, he is entitled to notice, because he may suffer injury to some extent for want of it." *Richardson*, J., *Sutcliffe v. M'Dowell*, 2 Nott & McC. 251; *Edwards v. Moses*, id. 433.

(o) In *Thackray v. Blackett*, 3 Camp. 164, Lord *Ellenborough*, C. J. seems to have given this as a reason. In *Legge v. Thorpe*, 12 East, 171, he said: "It has often happened to me, sitting at Nisi Prius, to be obliged to take an account between the parties, in order to see whether there were any, and what funds, or, more properly speaking, whether the drawer had probable funds left in the drawee's hands to answer the bill; whereas, if the courts had adhered to the original simple rule, all such inquiries would have been unnecessary, and no doubt would have existed in any case." It will be seen, by the remarks of *Coulter*, J., in *Wollenweber v. Ketterlinus*, 17 Penn. State, 389, 399, cited *supra*, note n, that he gave as a reason, that the drawer, without notice, would at least be liable to some injury. In *Hill v. Norris*, 2 Stew. & P. 114, 121, *Lipscomb*, J. said: "If indeed the court were to assume the province, or should direct the jury to determine, how far the assets in the hands of the drawee must be reduced before notice to the drawer could be dispensed with, it would be found exceedingly difficult, and I might with truth say that it would be impracticable to fix on any standard of depreciation. The instructions of the court below were to the effect, that, if there was a very small amount of funds in the hands of the drawee, that it did not entitle the drawer to notice; and the court seems to have drawn the conclusion, that, if the amount of funds so in the hands of the drawee was small, that the drawer could not be injured by want of notice. It seems, however, to us, that the reason of the rule would apply, and that,

is strongly urged, that where all transactions between the parties have ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with the understanding to say that a creditor for this balance who should draw for £1,000 would be in a situation substantially different from that in which he would be were he the debtor in the same sum.<sup>(p)</sup> The true

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although there might be but a small amount of assets, the drawer ought to have notice, to enable him to take steps to secure that amount, whatever it might be. I admit, that if there were circumstances to satisfy the jury that the drawer committed a fraud in drawing on the drawee, and that he knew that his bill would be dishonored, there would be much force in the argument that he ought not to be permitted to take shelter from the consequences of his fraud by intrenching behind a very small amount of assets that might be in the hands of the drawee. But I must again repeat, that I have not known a case, where there was any amount of funds in the hands of the drawee, that it has been ruled that the drawer was not entitled to notice."

<sup>(p)</sup> *Marshall, C. J., Hopkirk v. Page*, 2 Brock. C. C. 20, 34, where the drawee had a balance in his hands in favor of the drawer to the amount of 16s. 11d., the bill being £246. The drawer was held, without any notice of non-acceptance or payment. The learned judge said: "In attempting to show that notice of the dishonor of this bill was unnecessary, because the drawer had no effects in the hands of the drawee, the holder is met *in limine* by the fact, that this letter shows a balance in his favor of 16s. 11d., and the exception under which the plaintiff withdraws himself from the general rule is, that the drawer had at the time no effects in the hands of the drawee. If we may depart from the letter of the exception, there is no point at which to stop; and if notice may be dispensed with when a small sum is in the hands of the drawer, it may also be dispensed with when a large sum is in his hands, provided that sum be one cent less than the bill is drawn for. I am aware of this argument, but think it more perplexing than convincing." So in the *Matter of Brown*, 2 Story, 502, 520, *Story, J.* said: "But it is said, that, in cases of bills, due presentment and due notice are necessary whenever the drawer has any funds in the hands of the drawee; and the same reasoning applies to cases of checks. Now I deny both the premises and the conclusion. In the first place, as I understand it, the true doctrine is this, that if the drawer has a right to draw, in the belief that he has funds, or in the expectation that he shall have funds at the time of the presentment for acceptance, by reason of arrangements with the drawee, or putting his funds *in transitu*, then and in such cases he is entitled to due notice. But according to the doctrine now contended for, if the drawer knows that he has but one dollar in the hands of the drawee, and he has no expectation of any more being added, and has no right to believe that a bill for more will be honored, he may, nevertheless, draw a bill on the drawee for \$10,000; and if it is dishonored, as he knows it will be, he is entitled to strict notice; whereas, if he had not one dollar in the drawee's hands, he would not be entitled to any notice at all. Now I do not understand the law to involve any such strange anomaly, not to call it an absurdity. In each case the same reason applies; the draft is a fraud upon the holder; and in each case a meditated fraud shall not be sheltered behind a rule intended to protect the innocent and trustworthy." In *Blankenship v. Rogers*, 10 Ind. 333, an order was drawn for \$96, on which payment of \$38 was indorsed, and a protest made for the remainder. No notice of non-payment was held necessary. So in — *v. Stanton*, 1 Hayw. 271, where the drawee paid over the funds which he had, no notice, as to the residue, was held necessary. See *Smith v. Thatcher*, 4 B. & Ald. 200.

inquiry here, as in the other cases, must be whether the drawer was justified in drawing by a reasonable expectation that the bill would be honored.

There seems to be some little confusion with regard to the time when the reasonable expectation may be supposed to exist in the mind of the drawer. Thus, it has been said that actual notice is useless, and therefore unnecessary, only when, at the *time of drawing*, the drawer has no reason to expect that his bill will be paid.<sup>(q)</sup> But we think this view is open to much objection, and should say that the reasonable expectation depends, not on the state of things that exists at the time the bill is drawn, but upon the circumstances which exist at the time when it should be presented.<sup>(r)</sup>

Thus, although the drawer may have ample funds in the hands of the drawee at the date of the bill, or of the acceptance, yet, if he subsequently withdraws all his funds,<sup>(s)</sup> provided such

<sup>(q)</sup> *Marshall*, C. J., *French v. Bank of Columbia*, 4 Cranch, 141, 158. See the remarks of Lord *Ellenborough*, C. J., in *Orr v. Maginnis*, 7 East, 359. See *Richie v. McCoy*, 13 Smedes & M. 541.

<sup>(r)</sup> *Dorsey*, J., *Eichelberger v. Finley*, 7 Harris & J. 381, 386. In *Orear v. McDonald*, 9 Gill, 350, 357, *Martin*, J. said: "The right to demand and notice does not depend upon the fact that the drawers had, at the maturity of the draft, funds in the hands of the drawees, as ascertained by ulterior events, adequate to its payment. There is to be found in the adjudications on this subject no such stringent rule. On the contrary, we consider the principle as now established to be, that, if the drawers, at the time when the bill should have been presented, had the right to expect, reasoning upon the state of facts connected with the transactions as they then existed between the drawers and themselves, that their bill would be honored, they were entitled to demand and notice. The drawing of a bill under such circumstances is not to be treated as a fraud."

<sup>(s)</sup> *Rhett v. Poe*, 2 How. 457, where the drawer had funds at the time of the acceptance in the acceptor's hands, but subsequently withdrew them, agreeing to provide others at maturity, which he failed to do. The drawer was held, without notice of non-acceptance. So *Valk v. Simmons*, 4 Mason, 113; *Spangler v. McDaniel*, 3 Ind. 275, which was a suit on a non-negotiable draft. *Dorsey*, J., *Eichelberger v. Finley*, 7 Harris & J. 381, 386. *Contra*, *Orr v. Maginnis*, 7 East, 359, 3 J. P. Smith, 328. In this case, the bill was drawn for £172. At the time of drawing the drawee had some funds, how much did not appear. The drawer was a master of a vessel, who drew on account of supplies furnished his ship. The bill was presented for acceptance on July 19th, and acceptance was refused, but no notice was given. Some time in May, the drawee had settled with the drawer, paying over to him the balance due, which amounted to £116. The bill was again presented for payment on Oct. 22d, and notice of the dishonor duly given. The drawer was discharged for the neglect to give notice for non-acceptance. Lord *Ellenborough*, C. J. said: "If the drawer have effects at the time, it would be very dangerous and inconvenient, merely on the account of the shifting of a balance, to hold notice not to be necessary. It would be introducing a number of

withdrawal is prior to maturity or presentment; (*t*) or, having funds on the way, if he intercepts them and prevents them from coming into the hands of the drawee or acceptor, — he cannot be said to have any reason to expect the bill would be honored, and therefore he is not entitled to notice. (*u*)

So, perhaps, although the drawer at the time he draws the bill may have no effects, and no reason to expect his draft will be honored, yet, if he should place adequate funds in the hands of the drawee before presentment, he would be entitled to require due presentment and notice before he could be held liable. (*v*)

And where there have been no funds, and the drawer has no right to expect that the bill would be honored, notice to him is unnecessary, although subsequent to the presentment the drawee may have had funds. (*w*)

We should say that the mere fact that the drawer had no effects, from the time the bill was dated till maturity, would be

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collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and drawee, from the time the bill was drawn down to the time it was dishonored." *Dorsey, J.*, in *Eichelberger v. Finley*, 7 Harris & J. 381, 385, mentions this case as "a memorable illustration" of the fact that the essence and meaning of the rule laid down in *Bickerdike v. Bollman* had been lost sight of. He also said: "If a case can be imagined in which a want of effects, with a knowledge in the drawer that his bill would be dishonored, dispenses with notice, it might well be supposed this was that case. It does not appear that the drawer, at the time the bill was drawn, before or subsequently, ever had credit with the drawees for one farthing more than to the amount of the effects in hand. Having, then, withdrawn the only fund which could sustain the honor of his bill, did he not know, by anticipation, the fact of its non-acceptance?" See also the remarks of Lord *Ellenborough*, C. J., cited *infra*, note *v*.

(*t*) *Adams v. Darby*, 28 Misso. 162.

(*u*) *Valk v. Simmons*, 4 Mason, 113.

(*v*) *Dorsey, J.*, in *Eichelberger v. Finley*, 7 Harris & J. 381, 386. In *Hammond v. Dufrene*, 3 Camp. 145, the bill was drawn for £ 301. At the time of drawing and of accepting there were no funds, but before maturity the drawer sent the acceptor £ 400. The drawer was held entitled to notice of non-payment. Lord *Ellenborough*, C. J. said: "I think the drawer has a right to notice of the dishonor of a bill, if he has effects in the hands of the acceptor at any time before it becomes due. . . . I am aware that the inquiry has generally been, as to the state of accounts between the drawer and drawee when the bill was drawn or accepted; but I conceive the whole period must be looked to, from the drawing of the bill till it becomes due, and that notice is requisite, if the drawer has effects in the hands of the drawee at any time during the interval."

(*w*) *Cathell v. Goodwin*, 1 Harris & G. 468, where the drawee told the holder that he expected funds shortly, and when they arrived he would pay the bill. The funds did subsequently arrive, though at what time did not appear. No subsequent presentment was made, and no notice given. Held, that the drawer was liable.

sufficient, *prima facie*, to excuse want of presentment for acceptance, for payment, or for notice of either; and there are some authorities which adopt this view, (x) although it may be in conflict with others. (y) It will then be incumbent for the drawer to set up in defence such circumstances as will entitle him to a right to have expected that his draft would be honored. (z) There can be no hardship in this, for it would be easy for the drawer to show such circumstances if they exist, for they must be facts particularly within his own cognizance; and it would be very difficult for the plaintiff to prove the negative, or that there were no such circumstances.

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(x) *Durrum v. Hendrick*, 4 Texas, 495; *Cook v. Martin*, 5 Smedes & M. 379; *Collier*, C. J., *Tarver v. Nance*, 5 Ala. 712. In a suit on a protested order, the plaintiff is not bound to allege and prove notice of non-payment, if he allege and prove that, at the date of the order, the drawee had no effects of the drawer in his hands, except the amount paid and credited on the order on presentment. *Ibid.* In *Kemble v. Mills*, 1 Man. & G. 757, 767, *Tindal*, C. J. said: "Upon general demurrer, it is sufficient if we see that the plaintiff has excused himself upon the broad ground that the defendant had no assets in the bankers' hands; that is the ground upon which the early cases were decided, and if the defendant wished to object to the form of the declaration, he should have demurred specially." So *Maule*, J., *Kemble v. Mills*, 1 Man. & G. 771, *infra*, note z. In *Fitzgerald v. Williams*, 6 Bing. N. C. 68, *Tindal*, C. J. said: "The plaintiff having averred, as an excuse for not giving notice of the dishonor of the bill, that the defendant had no funds in the acceptor's hands, assigned a sufficient excuse, if he had stopped short there; for if the defendant had no funds in the hands of the acceptor, he was not damnified; if he was, after the issue he has taken upon the whole allegation, the proof would have come more properly from him." So *Parke*, B., in *Carter v. Flower*, 16 M. & W. 743, 750, referring to these cases, said: "Lord Chief Justice Tindal intimated, and we think correctly, that it would have been sufficient if the plaintiff had stopped with the averment of want of effects; and the allegation, that no damage was sustained, seems to have been treated by the court as immaterial. . . . We do not conceive that the court attributed any weight in giving their judgment, in *Kemble v. Mills*, to the averment that the defendant had sustained no damage. The Lord Chief Justice and Mr. Justice Maule expressly excluded that consideration, and rested on the broad ground, that the averment of want of assets was sufficient. In an action against the drawer of a bill, this form, therefore, must be deemed sufficient, at least on general demurrer." See the remarks of *Bayley*, J., cited *infra*, p. 551, note c.

(y) Whether the fact of absence of funds at maturity is sufficient to show absence of a right to expect the honor of the bill, would seem to be doubted or denied, in *Richie v. McCoy*, 13 Smedes & M. 541, where it was held that it was not, in the case of an accepted bill. See *supra*, p. 544, note i.

(z) *Durrum v. Hendrick*, 4 Texas, 495; *Cook v. Martin*, 5 Smedes & M. 379; *Collier*, C. J., *Tarver v. Nance*, 5 Ala. 712. In *Kemble v. Mills*, 1 Man. & G. 757, 771, *Maule*, J. said: "When it is shown that the drawee had no assets in the hands of the drawer, that is generally sufficient. Where there is anything to take the case out of the general rule, that should come from the other side." See the remarks of *Tindal*, C. J., cited *supra*, note x.



It would seem to be usual, however, to aver both want of effects, absence of a right to draw, and a denial of injury. The latter has been held unnecessary, because the want of effects itself is *prima facie* proof that there has been no injury; (a) and we can see no good reason why the absence of effects is not presumptive proof of an absence of a right to draw. So also, where a want of funds and absence of injury is alleged, it is not necessary to aver that the defendant had no reasonable expectation that his bill would be honored. (b)

It has been intimated, that if the drawer can prove injury, he will be entitled to a discharge from liability, at least proportionably. (c) We are not aware of any express decision to this effect, and should say that the only reason to support it would be the principle that the excuse of which we are treating is not to be extended; or the supposition that, if the drawer has no right to draw, he cannot suffer an injury from which due presentment and notice could save or protect him. (d) The injury has sprung from, and is the consequence of, his own act, which, if it be not absolutely fraudulent, must be considered as at least wrongful; and he should, we think, suffer for that for which he alone is to blame.

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(a) *Cook v. Martin*, 5 Smedes & M. 379. Nor is it necessary to prove it, if alleged, *id.* In *Fitzgerald v. Williams*, 6 Bing. N. C. 68, the plaintiff averred that the defendant had no funds, and had sustained no injury. The defendant pleaded that he had sustained damage, because the acceptor had promised to provide for the bill. Held, not incumbent on the plaintiff to prove that the defendant had sustained no damage. See the case and remarks cited *supra*, p. 550, note x. But in *Baxter v. Graves*, 2 A. K. Marsh. 152, it seems to have been held that the plaintiff should show that the defendant, a drawer, suffered no injury.

(b) *Thomas v. Fenton*, 5 Dow. & L. 28, *Coleridge, J.* said: "The reasonable expectation of assets entitles to notice only on the ground that the drawer, under such circumstances as raise that expectation, may be damnified by the want of it; to allege, therefore, that he has sustained no damage removes the ground on which notice is necessary. It may also be argued that the plaintiff is not bound, in the first instance, to allege that which cannot be within his knowledge, and that such a fact should properly come by way of plea."

(c) In *Cory v. Scott*, 3 B. & Ald. 619, *Bayley, J.*: "The case of *Bickerdike v. Bollman* is a right decision; but wherever the drawer can show that the want of notice may produce any detriment, the case will be very different. Where he has no effects in the hands of the acceptor, that is *prima facie* evidence that he will not be injured by the want of notice, but that *prima facie* presumption may be rebutted; and if the drawer can show actual prejudice, it takes it out of the case of *Bickerdike v. Bollman*." See the remarks of *Tindal, C. J.*, cited *supra*, p. 550, note x. This is the reason given in the cases cited *supra*, p. 546, notes n, o, which hold that proof of any effects whatever in the drawee's hands will entitle the drawer to notice.

(d) In some of the cases cited *supra*, p. 547, note p, there might have been a slight injury, and no notice was necessary. See also the cases on checks, *infra*, p. 552.



The same rules are applicable to the drawer of a check, who is liable without presentment or notice, if he has no funds in the bank upon which the check is drawn.<sup>(e)</sup> In our chapter on Checks we consider the law of presentment in regard to them: here we will only say, that the exception should be construed more liberally with regard to checks; at least where the check is drawn on a public banking corporation. These corporations do not receive goods on consignment, therefore there can be no reason to expect that the check will be honored on any such grounds as this. There would seem to be scarcely any reasonable grounds to expect payment, and, consequently, any right to draw a check, unless the bank had sufficient funds to pay it.<sup>(f)</sup> The bank has

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<sup>(e)</sup> In the following cases no presentment was held necessary, the drawer having no funds. *Cushing v. Gore*, 15 Mass. 69; *Franklin v. Vanderpool*, 1 Hall, 78; *Healy v. Gilman*, 1 Bosw. 235; *Coyle v. Smith*, 1 E. D. Smith, 300. *Contra*, *Radcliff, J., Cruger v. Armstrong*, 3 Johns. Cas. 5. In the following cases no notice of non-payment was held necessary. *Eichelberger v. Finley*, 7 Harris & J. 381; *Hoyt v. Seeley*, 18 Conn. 353; *Fitch v. Redding*, 4 Sandf. 130; *Coyle v. Smith*, 1 E. D. Smith, 400; *Healy v. Gilman*, 1 Bosw. 235; *Kemble v. Mills*, 1 Man. & G. 757, 2 Scott, N. R. 121. 9 Dowl 446; *In the Matter of Brown*, 2 Story, 502; *Radcliff, J., Cruger v. Armstrong*, 3 Johns. Cas. 5. See *Case v. Morris*, 31 Penn. State, 100. So where the drawer withdraws his funds before the time when the check should have been presented. *Coyle v. Smith*, 1 E. D. Smith, 400, where at the date of the check the drawer had a few dollars on deposit. Subsequently he had made a deposit, but withdrew it the next day. No presentment and notice were held necessary. *Sutcliffe v. McDowell*, 2 Nott & McC. 251. In this case, however, it appeared that the drawer withdrew his deposit, that the check might be dishonored. In *Brown v. Lusk*, 4 Yerg. 210, the drawer was held entitled to notice, although he had no funds in the bank, having drawn for the accommodation of the payee. *Sed quære*.

<sup>(f)</sup> We are not aware of any authority for this. In *Edwards v. Moses*, 2 Nott & McC. 433, all the facts that appeared were, that at the time when the check should have been presented, the drawer had withdrawn all his funds. *Richardson, J.* said that it was a mere case of overdrawing, and due presentment and notice were held necessary. But we doubt the authority of this case. In *Cruger v. Armstrong*, 3 Johns. Cas. 5, the check was drawn for \$ 2,500. On the day of its date the bank paid out checks of the drawer to the amount of \$ 3,500, and at the close of banking hours a balance was left of \$ 400. Presentment was held necessary, *Lewis, C. J.* dissenting. The authority of this case may be somewhat doubtful. *Radcliff, J.* said that presentment was necessary, though notice might not have been, and founds his opinion on this, which is clearly incorrect. *Kent, J.* said: "In the present case there is no such demand proved, nor is there anything so peculiar in this case as to take it out of the general rule. It cannot be considered as a check fraudulently drawn, without effects in the hands of the banker. The presumption is, that the check would have been paid if diligently presented; at least, there is not evidence sufficient to justify a resort to the drawer without having made the experiment." The answer to this may perhaps be, that the drawer is bound to know what his balance in the bank is, and as the holder is not bound to present a check, in any case, until the next day, and as there were checks outstanding, the amount of which, added to that of the check in suit, exceeded his balance, the presump

no right to allow any party to overdraw ; (g) consequently the drawer cannot expect it ; and where there are funds sufficient to pay a part only of the check, it is difficult to see how the drawer can be considered as having a right to expect that the check will be paid, inasmuch as the bank has a right to have the check delivered up to it on payment, as a voucher, and the holder would be unwilling to give it up on part payment only, because it would be surrendering the evidence of the drawer's indebtedness to him.(h) It would seem, also, that the fact that the bank held in pledge security belonging to the drawer would not alter the case, since checks are supposed to be drawn on cash actually on deposit ; unless the bank had promised on this security to pay the checks.

It has been held that this excuse is only applicable to the

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tion of payment would have been slight. A small balance will not entitle the drawer to presentment and notice. *Coyle v. Smith*, 1 E. D. Smith, 400. In the *Matter of Brown*, 2 Story, 502, where there were two checks to the amount of \$ 1,430. and a balance of \$ 30 on the day when they were drawn. *Eichelberger v. Finley*, 7 Harris & J. 381, where there were two checks, one for \$ 1,450, and the other for \$ 1,500, both dated March 26. At the date, the drawer's balance in the bank on which they were drawn was \$ 500, on the next day \$ 400, and for several days after from \$ 200 to \$ 400. The checks were presented June 3. In May, the bank appropriated all the funds of the drawer to the payment of a debt due by him to the corporation, in consequence of certain stock transactions.

(g) In *Eichelberger v. Finley*, 7 Harris & J. 381, 387, *Dorsey, J.* said, after referring to the cases on bills of exchange : " But it is conceived that, waiving all exceptions to the soundness of these decisions, they bear no application to the case now under consideration. They were made on transactions between individual correspondents who may have had a mutual confidence and credit, and were perfectly competent to honor each other's bills, drawn either with or without effects. Not so as to the officers of the public banking institutions in this State. With them the customers of the bank have no accommodation credit, and without a gross violation of their trust, they can honor no check or draft upon them beyond the amount of deposits standing to the credit of him by whom such check or draft may be drawn."

(h) In the *Matter of Brown*, 2 Story, 502, 519, *Story, J.* said : " Now in the case of a check, I take it to be clear, that the drawer implicitly engages that, at the time when the check is due and payable, he has, and will have then, and at all times thereafter, sufficient funds in the bank to pay the same, upon presentment ; and by the draft, he appropriates those funds absolutely for the use of the holder. Now the bank is not bound to pay, unless it is in full funds ; and it is not obliged to pay, or to accept to pay, if it has partial funds only, for it is entitled to the possession of the check on payment ; and indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the check, which the holder cannot safely part with, unless he receives full payment, nor the bank exact, unless under the like circumstances. The holder is not bound to accept part payment, even if the bank is willing to pay in part, for he has a claim to the entirety."

drawer, and does not apply in the case of an indorser, because the latter has no concern with the accounts between drawer and drawee, and as he has the drawer liable over to him, he may be injured by want of the notice; and consequently, the indorser is entitled in all these cases to due presentment and notice.(i)

Though this would be true in general, yet there may be exceptions. Thus, where the indorser, at the time he indorsed, knew that the drawer had no right to draw, and the latter was under no obligations as regards the former to take up the bill, it may well be doubted whether a demand or notice would be necessary to charge the indorser.(j) Certainly, if the drawing were a fraud, and the indorser at the time of indorsing was aware of that fact, he could have no remedy over against the drawer, for he must be considered as a party to the fraud.

In concluding this particular subject of excuse, we cannot but think that much of the obscurity and confusion which exists is owing to the desire manifested by the courts to lay down and adhere to a fixed and inflexible rule, — that notice is in all cases

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(i) *Wilkes v. Jacks*, Peake, 202; *Warder v. Tucker*, 7 Mass. 449; *Mohawk Bank v. Broderick*, 10 Wend. 304, 13 id. 133, a check case; *Scarborough v. Harris*, 1 Bay, 177; *Fotheringham v. Price*, id. 291; *Boyle, C. J., Ralston v. Bullitts*, 3 Bibb, 261, 263; *Denniston v. Imbrie*, 3 Wash. C. C. 396; *Ramdulollday v. Darioux*, 4 id. 61, where *Washington, J.* said: "No case has ever yet gone so far as to dispense with notice to indorsers. And it is most obvious that the reason upon which the rule in *Bickerdike v. Bollman* proceeded is inapplicable to the case of an indorser. A man who draws a bill when he knows that he has no right to do so, and then parts with it for a valuable consideration, is, to say the least of him, guilty of legal fraud, and consequently is not entitled to the benefit of notice. Besides, he cannot be injured from the want of it, as he has no person to look to but the drawee, and therefore cannot suffer if he had nothing in his hands on which to draw. But what is all this to an indorser who has committed no fraud, actual or constructive, and who, having a claim to indemnity against every person upon the bill above himself, ought to be placed in a situation to secure himself if he can?" See *Carter v. Flower*, 16 M. & W. 743, *Parke, B.*

(j) In *Sisson v. Thomlinson*, 1 Selw. N. P., 11th ed., 257, Lord *Ellenborough, C. J.* ruled, that "where the indorser has not given any consideration for a bill, and knows at the time that the drawer has not any effects in the hands of the drawee, he, the indorser, is not entitled to notice of the non-payment." So *Farmers' Bank v. Vanneter*, 4 Rand. Va. 553, where the indorser knew, at the time of indorsing, that the drawer had no right to draw, or to expect payment. The point arose in *Fenwick v. Sears*, 1 Cranch, 259, but was not decided. In *Corney v. Da Costa*, 1 Esp. 302, *Buller, J.* said: "That it was undoubtedly necessary that an indorser of a note should have notice of the default of the maker in payment. But that was only the case where there were effects of the indorser in the maker's hands, and that he might suffer from the want of such notice; but when there were no effects, no notice was necessary."

necessary, to which all circumstances must bend, — rather than to allow an exception, once well established, to be moulded and varied by the changing circumstances of each case. It would be better to overrule the original case at once, than to confine it within artificial limits, or to so pare it away by exception after exception, that the reasons on which the rule itself rests are lost sight of and disappear.

Questions closely connected with the topic which we have just been considering have arisen in the case of accommodation paper. A party may request another to draw upon him, although there may be no funds in his hands, and no expectation of having any; and the bill may be drawn at such request, and then, when it is accepted, the acceptor may be able to negotiate it, and thereby raise money on the strength and credit of the drawer's name. In such case the drawer clearly has a right to draw,<sup>(k)</sup> and, in accordance with the rule already laid down, is entitled to demand that regular presentment be made, and that due notice be given, in case of dishonor.<sup>(l)</sup> There is also this additional fact to be taken into consideration, that the acceptor, in such case, is liable to the drawer, and the latter may be injured by the neglect to receive prompt notice, and so be deprived of some opportunity which he might otherwise have had of indemnifying himself.

The same rule applies where the drawer drew for the accommodation of another party, as an indorser,<sup>(m)</sup> for instance, or a co-drawer.<sup>(n)</sup>

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(k) *Marshall, C. J., French v. Bank of Columbia*, 4 Cranch, 141.

(l) *Sleigh v. Sleigh*, 5 Exch. 514, where the drawer paid a part of the bill, knowing that he had been discharged by laches in presentment and notice; and it was held that he could not recover the amount of the acceptor in an action for money paid to his use. See *Ex parte Heath*, 2 Ves. & B. 240; *Bank of Louisiana v. Morgan*, 13 La. Ann. 598; *Shirley v. Fellows*, 9 Port. Ala. 300, where there were no funds in the hands of the acceptor, — notice of non-payment was held necessary; *Sherrod v. Rhodes*, 5 Ala. 683, where it was held that it made no difference that the drawer owed the acceptor a sum equal to the amount of the bill, since it did not appear that the bill was drawn in payment of the debt.

(m) *Whitfield v. Savage*, 2 Bos. & P. 277; *Cory v. Scott*, 3 B. & Ald. 619; *Norton v. Pickering*, 8 B. & C. 610, where neither the drawer nor indorser had any effects in the hands of the acceptor; *Curry v. Herlong*, 11 La. Ann. 634; *Brown v. Lusk*, 4 Yerg. 210. But the case might well be different, where acceptance had been refused, the drawer having no pretence of a right to draw, and the accommodated party knowing this fact.

(n) *Miser v. Trovinger*, 7 Ohio State, 281, where it was contended that the unity of

The indorser of a bill for the accommodation of the drawer, (o) or for another indorser, (p) would, for a still stronger reason, be entitled to regular demand and notice; unless the indorsement were proved to have been made under circumstances clearly showing that the drawer had no right to draw, or to expect the honor of the bill; (q) and we should also say, unless these circumstances were known to the indorser.

A party may likewise indorse a note for the accommodation of the maker, and this being, as we have seen, very analogous to drawing a bill on the maker and an acceptance by the latter, the same rule applies, and the indorser is entitled to notice. (r) So

interest was such that, it being unnecessary to give notice to the accommodated party, rendered it unnecessary to give notice to the others.

(o) *Warder v. Tucker*, 7 Mass. 449. See *Rea v. Dorrance*, 18 Maine, 137, where an indorser was discharged, presentment having been made the day after maturity.

(p) *Brown v. Maffey*, 15 East, 216, where the drawer, acceptor, and two other indorsers besides the defendant, accommodated the last indorser. It appeared that the defendant was not aware, when he indorsed, of the absence of effects in the acceptor's hands.

(q) *Farmers' Bank v. Vanmeter*, 4 Rand. Va. 553; *Sisson v. Thomlinson*, 1 Selw. N. P., 11th ed., 257.

(r) *French v. Bank of C.*, 4 Cranch, 141; *Smith v. Becket*, 13 East, 187; *Sandford v. Dillaway*, 10 Mass. 52; *Jackson v. Richards*, 2 Caines, 343; *Buck v. Cotton*, 2 Conn. 126; *Holland v. Turner*, 10 id. 308; *Groton v. Dallheim*, 6 Greenl. 476, where the indorser was discharged because presentment was made the day after maturity, and no notice given for more than three months; *Bogy v. Keil*, 1 Misso. 743; *Denny v. Palmer*, 5 Ired. 610. The contrary doctrine appears to have been held in *De Berdt v. Atkinson*, 2 H. Bl. 336, where the indorser at the time of indorsing knew that the maker was insolvent. The demand was made the day after maturity, and no notice given for five days. The indorser was held. Lord C. J. Eyre's opinion proceeded mainly on the ground that the notice was absolutely useless where the indorser was well aware of the maker's insolvency at the time of indorsing. *Buller*, J. said: "Here it is plain that the indorser lent his name merely to give credit to the note, and was not an indorser in the common course of business. It is no answer to say that he received no benefit; he never meant to receive any." *Rooke* and *Heath*, JJ. simply concurred. This case was decided in A. D. 1794, and in seventeen months after a similar question arose in *Nicholson v. Gouthit*, 2 H. Bl. 610, the facts of which case were as follows. The maker was insolvent, and the defendant indorsed for his accommodation. Just before maturity the indorser, learning that the maker had made no provision for the payment of the note at the banker's at whose place of business the note was payable, desired the banker to refer the party presenting the note to him, and he would pay it, as he then had a fund to meet it. The note was not presented till three days after maturity, and if presentment had been made at the proper time, it would have been paid; but not having been so presented, the defendant had paid away the money which he held for that purpose. The indorser was discharged. Lord C. J. Eyre, delivering the opinion, and *Heath* and *Rooke*, JJ. concurring. Although the circumstances of the two cases were not precisely similar, yet there was not sufficient difference to reconcile both. In both the maker was insolvent, and even if the insolvency

it would be where the indorser indorses for the accommodation of a prior party or a third person.(s)

The case is different where the drawer,(t) or the indors-

were not actually known to the indorser at the time of indorsing, in the latter case this fact was of no importance. It is somewhat remarkable, that in the latter case no mention whatever was made of the former, although there were three judges at least sitting in both the cases. But *De Berdt v. Atkinson* must be considered as overruled. In *Leach v. Hewitt*, 4 Taunt. 731, *Chambre, J.* said: "Mr. Barnes, the learned editor of my brother Bayley's work on Bills of Exchange, has subjoined, on p. 136, a very sensible note upon the case of *De Berdt v. Atkinson*. He says: 'The court appear to have proceeded on a misapplication of the rule which obtains as to accommodation acceptances; in those cases the drawer, being himself the real debtor, acquires no right of action against the acceptor by paying the bill, and suffers no injury from want of notice of non-payment by the acceptor. But in this case the maker was the real debtor, and the payee a mere security, having a clear right of action against the maker, upon paying the note; and therefore entitled to notice, to enable him to assert that right.'" In *Free v. Hawkins*, 8 Taunt. 92, 96, *Park, J.*, interrupting counsel, said: "*De Berdt v. Atkinson* has been shaken in every printed book, and in the practice of every one at the bar." So *Maule, J.*, in *Sands v. Clarke*, 8 C. B. 751, 760, says, "that case has been dissented from, if not distinctly overruled"; Lord *Denman, C. J.*, *Terry v. Parker*, 6 A. & E. 502, 507; *Bissell, J.*, *Holland v. Turner*, 10 Conn. 308. See also the remarks of *Marshall, C. J.* on these cases, in *French v. Bank of Columbia*, 4 Cranch, 141, 162. The case of *De Berdt v. Atkinson* is inconsistent with the cases cited in the previous notes to this chapter.

(s) *Leach v. Hewitt*, 4 Taunt. 731; *Carter v. Flower*, 16 M. & W. 743. In this case the declaration alleged, that neither at the time when the note was made, nor afterwards, and before it became due, nor when it became due, and on presentment for payment, had the maker or the payee any effects of the defendant in his hands, nor was there any consideration or value for the making of the note, of the payment thereof, or its indorsement by the payee to the defendant, and that the defendant had not sustained any damage by reason of his not having had notice of the non-payment of the note. On special demurrer it was held, that against an indorser the declaration was bad, for not stating a sufficient excuse for want of notice; for, consistently with the allegations, the note might have been indorsed by the defendant for the accommodation of one of the prior parties to it, or some third person, in which case the defendant would be entitled to notice.

(t) *Sharp v. Bailey*, 9 B. & C. 44, 4 Man. & R. 4, where it was also held that the fact that the drawer drew the bill payable at his own house is evidence that the acceptance was for his accommodation. *Sed quære.* *Reid v. Morrison*, 2 Watts & S. 401; *New Orleans Bank v. Harper*, 12 Rob. La. 231; *Lacoste v. Harper*, 3 La. Ann. 385; *Gillespie v. Cammack*, id. 248. See *Nicolet v. Gloyd*, 18 La. 417; *Evans v. Norris*, 1 Ala. 511. In *Ex parte Heath*, 2 Ves. & B. 240, Lord *Eldon* said: "The courts were obliged necessarily to decide that, if bills were accepted for the accommodation of the drawer, and there was nothing but that paper between them, notice was not necessary, the drawer being, as between him and the acceptor, first liable; but if bills were drawn for the accommodation of the acceptor, the transaction being for his benefit, there must be notice without effects. And if, in the result of various dealings, the surplus of accommodation is on the side of the acceptor, he is, with regard to the drawer, exactly in the situation of an acceptor having effects, and the failure to give notice may be equally detrimental."



er,(u) is the party accommodated ; because he can have no remedy against the acceptor or maker, inasmuch as his name was put upon the paper merely to give it credit as regards third parties, and because he is bound to provide the maker or acceptor with funds.

But although a party may make a note for the accommodation of an indorser, it is said he is not entitled to notice of the dishonor of the note at the place where it is payable,(v) notwithstanding he may have a remedy against the indorser, and his liability to injury is as great as that of an accommodation drawer or indorser, because notice is never required to be given to a party who is primarily liable as regards third parties. This must be true so far that the maker is not discharged by want of notice, because no maker is. It may be, however, that such a maker would be considered as standing in the relation of guarantor to a holder who knew all the facts, and that he would be entitled to reasonable notice, and would be discharged if he could show actual injury caused by negligence in this respect.

It is obvious that many of the principles with respect to excuse for want of presentment must apply equally to failure to give notice ; yet it may be well, perhaps, to state them in this place, although it must necessarily involve some repetition of what has already been said.

Where the holder is dead, and no executor or administrator is appointed before the maturity of the bill or note, as the indorser will not be discharged by failure to present at maturity,(w) so the same facts will of course constitute a valid excuse for not giving

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(u) *Reid v. Morrison*, 2 Watts & S. 401 ; *Shriner v. Keller*, 25 Penn. State, 61 ; *Archer, J.*, *Clopper v. Union Bank*, 7 Harris & J. 92, 102. In *Torrey v. Foss*, 40 Maine, 74, notice to the indorser was held unnecessary, although at the maturity of the notes the maker was indebted to the indorser. *Tenney, J.* said : " In the case before us, notwithstanding a balance was in the hands of the maker of the notes, by the agreement between him and the defendant, the paper was to be provided for by other means of the defendant, and at no time was it expected that this balance was to be appropriated for the payment, and the case is to be treated as it would be if nothing was in the maker's hands belonging to him. After the agreement between them, such as the evidence shows that it was, it would have been an absurd expectation on the part of the defendant, that, because the maker of the notes was owing him a sum short of two hundred dollars, he should have transmitted funds to the bank sufficient to meet the two notes which he had signed." The amount of the notes was \$ 887.

(v) *Hansbrough v. Gray*, 3 Gratt. 356.

(w) *Supra*, p. 444.



notice until after actual presentment,(x) provided such presentment be made within a reasonable time after the appointment of the executor or administrator. The same rule has been applied where a note had been left with an agent to collect, who died four days before its maturity, after a sickness of more than a month. The note was locked up in a desk, where it remained nearly a month after his death; and the executrix, immediately upon its discovery, caused it to be presented and immediate notice to be given, which was held sufficient to charge the indorser.(y)

Where a note is void as against the maker, no presentment would seem to be necessary,(z) because there is no one upon whom demand can be made. This reason does not apply to want of notice to the indorser that the note was not paid when due; yet we do not think that such notice would always be necessary. Thus, where the note is void, and the indorser looked to is the first, or only indorser, he would be held without notice;(a) and for the same reason the party who indorsed a note next after a forged indorsement might be held to subsequent holders without demand on the party whose note is forged, or notice of his refusal; because, however it might be in fact, the law cannot presume that one whose name is forged to an instrument would pay it.

It has frequently been remarked, that the indorsement of a note is like drawing a bill on the maker, and an acceptance by the latter. If the analogy is to be carried out, the first valid indorsement of a void note would seem to be either like an unaccepted bill without any drawee, or a bill drawn without any funds, or the expectation of having any. In the latter case we

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(x) *White v. Stoddard*, 11 Gray,

(y) *Duggan v. King*, Rice, 239.

(z) *Supra*, p. 444.

(a) In *Copp v. M'Dugall*, 9 Mass. 1, the indorser was held without any notice, and the evidence that the note was void for usury appears to have been a recognition by the defendant, an indorser, of its illegality. In *Chandler v. Mason*, 2 Vt. 193, the indorser was held without notice being given, as appears by a remark of *Hutchinson, J.*, p. 195. The note was void on account of want of consideration. In *Gray v. Bell*, 3 Rich. 71, *O'Neill, J.* thought that the indorser of a note negotiated when overdue was to be regarded as a new maker, or as a drawer without funds, and not entitled to demand or notice. No notice is necessary to be given to an indorser, where the bill is not drawn on a proper stamp. *Cundy v. Marriott*, 1 B. & Ad. 696, where the bill had been accepted.

have seen that no notice is necessary; and in the former, the instrument is not a bill, but may be treated as a promissory note; in which case no notice would be necessary, because the drawer is the party primarily liable.

In one case it was held that a party who indorsed a bill purporting to be drawn by an agent on his principal, both of whom were fictitious persons, was entitled to notice; (b) but it appeared that the indorsement was made for the accommodation of a third party, who was therefore liable over to the indorser. (c) But, even if the indorser had been aware of the non-existence of the drawer and drawee when he put his name upon the note, he would not probably have been considered entitled to notice; (d) because he would be a partaker in an act well calculated to deceive any party who might subsequently purchase the instrument, and might prevent the purchaser from inquiring as to the signature of the drawer; because the indorser had held out the instrument as genuine.

It may also be remarked, that the indorser is certainly liable, whether he knows that the maker or drawer are actual persons or not, since an indorsement is, as will be seen hereafter, a warranty of the genuineness of the antecedent signatures. (e) The only question is, indeed, whether his liability is that of an ordinary indorser, or that of a maker of a new note.

Another important ground for the denial of all right in an indorser to require demand of the maker and notice of dishonor exists where the indorser, before maturity, has received an assignment of all the maker's effects, to secure him for the liability incurred by him as indorser. And the reasons why this fact deprives the indorser of his right to demand and notice are, first, that he has thereby in effect prevented the holder from obtaining the amount of the note from the maker, because he has taken into his hands all the available means which the latter possessed of paying the debt; consequently, he must be regarded as holding out to the party who would ordinarily be required to make a due demand and give regular notice, that he, the indorser, has

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(b) *Leach v. Hewitt*, 4 Taunt. 731. The opinions in this case are short, and not very satisfactory.

(c) *Parke, B., Carter v. Flower*, 16 M. & W. 747.

(d) *Green, J., Farmers' Bank v. Vanmeter*, 4 Rand. Va. 553, 561.

(e) *Infra*, Chapter on Indorsement.

become primarily responsible for the debt.(f) And, secondly, that having already received from the maker all that the maker can give, he cannot recover anything more from him by way of

(f) In *Corney v. Da Costa*, 1 Esp. 302, at a meeting of the creditors of the makers, it was proposed to assign by deed all their effects to trustees for the benefit of the creditors. Afterwards the defendant, to avoid expense, agreed to become indorser of notes at different dates, to be given to the creditors for the amount of their respective compositions; and the notes were accordingly made payable to his order, and indorsed by him. He took effects of the insolvents to the amount of the composition. The note in suit, being one of those indorsed in this manner, was due Dec. 6th, but no notice was given to the defendant until Jan. 14th. The indorser was held. *Buller, J.* said: "The present was not the common case of the maker of a note making default, and no notice given; the defendant made himself liable at all events, the creditors insisted on it; he therefore was solely liable, and being so, could not avail himself of want of notice." In *Bond v. Farnham*, 5 Mass. 170, notice was left on the day of maturity at a store formerly occupied by the defendant, but not at that time in his possession. Three days afterwards he was notified. The defendant having indorsed several notes for the maker besides the one in suit, the latter assigned to him, as security for the indorsements, all his property, which was not, however, sufficient to secure the defendant against the notes, exclusive of the one in suit. The maker was insolvent at maturity. *Parsons, C. J.*, after stating that the notice given was insufficient, said: "We are satisfied that the verdict for the plaintiff is right; because, under the circumstances of this case, the defendant had no right to insist on a demand upon the maker. It appears that he knew such a demand must be fruitless, as he had secured all the property the maker had, and as he secured it for the express purpose of meeting this and his other indorsements, he must be considered as having waived the condition of his liability, and as having engaged with the maker, on receiving all his property, to take up his note. And the nature or terms of the engagement cannot be varied by an eventual deficiency in the property, because he received all there was." See this case commented upon *infra*, p. 568, note o. In *Barton v. Baker*, 1 S. & R. 334, one member of a firm which made the note assigned all his estate to the defendant, to indemnify him for certain advances of money, and for indorsements on account of the firm, one of which indorsements was in suit. This was held to be a waiver of laches in giving notice. *Tilghman, C. J.* said: "Now, by the taking of this assignment, it is not unreasonable to presume that the defendant took upon himself the payment of the indorsed notes, especially as, when he did receive notice ten days after the note fell due, although he knew and remarked that it was out of time, he did not deny his responsibility, but said that his ability to pay would depend on the arrival of a vessel. I agree, therefore, with *Bond v. Farnham*, 5 Mass. 170, where it was held that, in such case, the indorser dispenses with notice." See also the remarks of *Gibson, C. J.*, in *Kramer v. Sandford*, 4 Watts & S. 328.

In *Bank of South Carolina v. Myers*, 1 Bailey, 412, the defendant had taken from the maker a confession of judgment which covered the whole estate of the latter. It was held competent for the plaintiff to show, by parol evidence, that the confession of judgment was intended to secure the indorser against his liability on the indorsement, that this was a waiver of demand and notice, and that the defendant was liable, notwithstanding laches in giving notice. *Colcock, J.* said: "Whether notice may be dispensed with in a case where the indorser takes collateral security, which covers the whole of the maker's estate, whereby he not only enables himself to pay the debt, but interposes an insurmountable obstacle to the recovery of the holder, must be determined

indemnity, and therefore cannot be injured by losing an opportunity to demand indemnity.

The rule we consider to be established by the weight of au-

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by referring to the reason of the rule, and its application to such a case. The reason of the rule is stated by all writers on the subject to be, that the parties to the note or bill may, respectively, take the necessary measures to obtain payment from the parties respectively liable to them; and if notice be not given, it is a presumption of law that the drawer and indorsers are prejudiced by the omission; and it is on this principle that notice of non-acceptance and non-payment are required. On the case made, it is at once obvious that, if notice is given to the indorser, he is not benefited by it. He has already secured himself as far as it is practicable for him to do so. He had obtained an operative lien on all the maker's estate, as well as the means of taking his body, if he should think that proper or necessary. If an individual, who is not content to rely on the security which the rules of law afford him, thinks proper to protect himself, surely there can be no reasonable objection interposed to his doing so, provided he does not thereby interfere with the rights of others; but if in his arrangements he destroys the operation of a rule of law which may be beneficial to another whom he has induced to enter into the contract, it cannot be doubted that he should respond in damages to such person. Now this previous judgment, covering the whole of the maker's property, most manifestly prevents the plaintiff in this case from proceeding; for the decisions of our courts always have been, that the sheriff must pay over money to the oldest judgment and execution creditors. It would, therefore, have been a nugatory act, in such a case, to have forced a sale of the maker's property. This interposition of the indorser may, I think, be considered in the light of a legal fraud; for it might in fact be made use of to effect a moral fraud. I mean not to intimate that such has been the case here. But suppose, in such a case, that the holder should not discover the purpose for which judgment had been given, would he not be defeated in his proceedings to recover his debt? There certainly is nothing to prevent the indorser from selling all the property under his judgment, and disposing of it as he pleases. And take the case where all the parties are apprized of the object and intention of the maker in confessing a judgment to secure the indorser, if it affords an additional security to the holder, it is by diminishing the old security; and it is like an undertaking on the part of the indorser, in addition to his own responsibility, to pay the debt out of the maker's funds which are thus placed at his disposal, or at least subject to his control." After commenting upon the cases cited previously in this note, the judge concluded by saying: "We are ourselves unanimously of opinion that these cases, so far as authority is important, are sufficient; and that the reason of the rule ceasing, the rule itself is rendered inapplicable." See *Barrett v. Charleston Bank*, 2 McMullan, 191; *Stephenson v. Primrose*, 8 Port. Ala. 155; *Perry v. Green*, 4 Harrison, 61. In *Vreeland v. Hyde*, 2 Hall, 429, the makers had made an assignment of their property to the defendant and another party for the benefit of their creditors, wherein it was stipulated that, if the defendant was liable on his indorsement of the note in suit, the money should be refunded to him out of the proceeds of the assignment. As was well remarked by *Hornblower, C. J.*, in *Perry v. Green*, 4 Harrison, 61, this was a sufficient reason for a judgment in favor of the plaintiff, who had neglected to make a demand for an unreasonable time; although it was not adverted to by the court, who decided the case for the plaintiff on very questionable grounds. *Mechanics' Bank v. Griswold*, 7 Wend. 165, where the assignment was of all the maker's property to the defendant and one other, in trust, to dispose of the property, collect the debts, and, after deducting the charges of the trust, to pay the debts in a certain order, first satisfying all the notes and debts for which the defendant and a cer-

thority, even where the property assigned is insufficient to cover the whole liability of the indorser.<sup>(g)</sup> But there is authority to the effect that such assignment is no waiver of due demand, unless it is sufficient to entirely protect the indorser,<sup>(h)</sup> and an

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tain firm, or either of them, were liable as sureties or indorsers; *Nelson, C. J., Spencer v. Harvey*, 17 Wend. 489. See *Bruce v. Lytle*, 13 Barb. 163; *Johnson, J., Seacord v. Miller*, 3 Kern. 55; *Benedict v. Caffé*, 5 Duer, 226, 233; *Hosmer, C. J., Prentiss v. Danielson*, 5 Conn. 175, 180; *Duvall v. Farmers' Bank*, 9 Gill & J. 31. In *Denny v. Palmer*, 5 Ired. 610, the judge refused to charge the jury, at the request of the plaintiff, that if the makers had conveyed all their property to a trustee, as an indemnity to the defendant, this was a waiver of notice. This refusal was held correct. But it appears by the facts that the conveyance did not comprise all the maker's property. In *Coddington v. Davis*, 3 Denio, 16, the maker assigned all his property to one of the plaintiffs, in trust, to pay his debts according to a certain order of preference, and among the first in order was the defendant, for the indorsement sued on and for other debts. The defendant also signed an order addressed to the trustee, directing him to pay to the order of the plaintiffs all the money as fast as collected, to the extent of the indorsement. There was also an express waiver. *Jewell, J.* thought the assignment a waiver of notice. This case was affirmed in the Court of Appeals, 1 Comst. 186, but the court there proceeded upon the express waiver.

(g) *Bond v. Farnham*, 5 Mass. 170, *supra*, p. 561, note f.

(h) In *Watkins v. Crouch*, 5 Leigh, 522, the note in suit was payable at a particular place, and not having been presented there, the indorser was not liable. But he had received an assignment of all the maker's effects; and this, it was contended, amounted to a waiver of his right to require a demand to be made at the specified place, and put him in the same condition in which the maker was. It was contended by counsel that no indemnity was especially provided for by the deed of assignment as to the note in suit, but that it was only provided for in a general provision for all the debts of the assignor. The court seem, however, to have considered it as providing an indemnity to the indorser for a fourth part of the note. These facts were held no waiver of the indorser's right to require a demand at the place specified, *Brooke, J.* dissenting. *Carr, J.* said: "The deed is made an exhibit in the bill of exceptions, and I think may fairly be considered a conveyance of all the grantor's property. It is given for the security of several enumerated debts, and among others of one fourth of the note on which the suit was brought. What was the value of the property, or what proportion it bore to the debts intended to be secured by it, does not appear; that it was not sufficient to secure the whole we are obliged to conclude. . . . When a note is made payable at a particular place, proof of a demand at the place is indispensable, in a suit against the indorser. Did the deed place the indorser completely in the shoes of the maker? I should agree that it did, if it appeared that the property conveyed was sufficient for full indemnity against the note, and was by the deed appropriated to such indemnity; but the sufficiency of the property makes no part of the case; and it appears by the deed that the trustees are not authorized to appropriate any part of it to indemnity against more than a fourth of the note. It was said, however, that the property, whether adequate or not, was all the maker had; and that, having thus become utterly insolvent, there could be no hope of his providing funds at the bank to discharge the note, and therefore no necessity of presenting it. But we see, from many cases, that the most perfect knowledge of the insolvency, or even bankruptcy, of the maker, does not dispense with a due presentment and notice of dishonor. He may have friends or credit;

opinion has been intimated, that an insufficient assignment may

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or the sagacity and vigilance of the indorser may discover other sources of indemnity. It is his own affair, and he ought to be the judge. . . . But it was said, that here the insolvency is produced by the indorser himself; that he has appropriated to his own use the funds which might have gone to discharge the note; and that we cannot suppose such a conveyance would be made without an agreement between the parties, that the indorser should attend to the note, take the maker's place, and release him from all further care about it. I cannot perceive the correctness of this reasoning. Why should the indorser take the maker's place? Was it not better that he should continue to hold his station of collateral surety? Better both for himself and the maker? He was bound conditionally for the debt, and he might well say to the maker: 'My friendship for you has led me into this engagement; it is but fair that you secure me, so far as you can; your property may not pay a fourth of the debt, yet it will be something; in the meanwhile we will continue to hold our relations of principal and surety; before the note comes to maturity new prospects may open upon you, new friends may arise, new accessions of fortune may fall in; and the holder of the note will have to proceed with due diligence before he can come upon me.' Is not this the more natural course? And does it invade any right of the holder, or impose any hardship on him? No; he has only to attend to his own interest, and pursue the beaten track of due diligence. I cannot think, then, that, by the execution of the deed, the indorser lost his character of surety, and became a principal debtor; and I am of opinion that, in order to charge him, it was incumbent on the holder of the note to prove, at least, a presentment at the place of payment, if not due notice of such presentment." *Cabell, J.* said: "The indorser, in taking an assignment of property sufficient to pay only part of the note, did not undertake to pay the residue. It may be confidently asserted, that there is not, in the terms of the assignment, any express contract to that effect; nor can I see a single circumstance in the whole transaction from which such a contract can be implied. The assignment of property sufficient only for the partial indemnity of the indorser was a matter between him and the maker of the note. There was no motive in either of the parties to that arrangement, which could induce a wish that the indorser should waive the condition of his liability. How, then, can we imply such waiver in favor of a person who was no party to the arrangement? How can we imply it from the mere fact of a partial indemnity? Suppose the maker of the note had had no other property but money, not equal, however, to the amount of the note, and had put that money, all he had, into the hands of the indorser, to be applied by him to the payment of the note, would this have exempted the holder from the obligation of presenting the note, and giving notice of its dishonor? Certainly not; and I am unable to see any difference between the deposit of money and the assignment of property, so far as regards the point under consideration. Nor is there any resemblance between an indorser of a note partly indemnified, and the drawer of a bill of exchange, who withdraws his effects from the hands of the acceptor before the day of payment. In the latter case, the drawer has no right to expect that the acceptor will pay, and therefore he is not entitled to notice. But the indorser's right to notice from the holder depends on another principle, namely, his remedy over against the maker. And this principle applies as forcibly to a case where a part only of a note remains unpaid or unprovided for by the maker, as where the whole of it remains so unpaid or unprovided for. Again, the assignment in this case was made about a month before the note was to fall due. It is impossible for us to say that no accession was made, in that interval, to the maker's means of payment; and, of course, we cannot say that notice to the indorser would have been unavailing."



be a waiver of notice, but not of regular demand.(i) It seems to have been held that the assignment, to have the effect of a waiver, must be for the purpose of protecting the indorser from

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(i) *Tucker, P., Watkins v. Crouch*, 5 Leigh, 522, 547, who said : " If the question was merely as to notice, I should incline to think the taking a conveyance of all his property from the maker ought to dispense with the necessity of notice. The object of notice to the indorser is to put him on the alert, to announce to him that he will be looked to, and to warn him to take care of himself. And hence even insolvency or bankruptcy is no excuse for want of notice, since it is possible the indorser might find some means to save himself out of the wreck of his debtor's fortune, or through the assistance of his friends. But when the indorser himself, conscious of his liability, is already on the alert, and proceeds to take care of himself with all diligence and activity, and actually sweeps the whole estate of the maker for his own indemnification ; when he has done this with a knowledge of the maker's insolvency, and after consulting with a friend whether he had better pay the note, or suffer it to take its course, *cui bono* shall the holder give him notice ? Is it to stimulate his vigilance, who has proved himself already so watchful ? Is it to warn him to take care of himself, who has been already on the alert, and has swept off land, negroes, stock, household and kitchen furniture, bonds, bills, notes, and open accounts, and all other property of the maker ? It were a mockery to give, or to require a notice to be given, to one thus circumstanced. If payment of part, or a promise to pay or to see it paid, or an acknowledgment that it must be paid, dispenses with the necessity of notice, how much stronger is the case of one who not only confesses his liability, by taking an indemnity providing 'for paying off and discharging the note,' but who takes a conveyance of every article of property held by the maker, and thus prevents the maker's complying, in whole or in part, with his engagement to the holder. Accordingly, we find the clearest authority on this subject in the courts of two of our sister States, — *Bond v. Farnham*, 5 Mass. 170 ; *Barton v. Baker*, 1 S. & R. 334, — in both of which the acceptance, by the indorser from the drawer, of a general assignment of his estate and effects, was held to dispense with the necessity of notice. That the assignment was made, in this case, to a trustee, I consider not at all varying the case. But this is not a question as to notice. In this case the bill never has been presented for payment, at the places appointed ; and the question is, whether this assignment of the maker's effects, for the indemnity of the indorser, places him so far in the shoes of the maker as to exempt the holder, in an action against the indorser, from averring and proving a demand at the time and place specified by the bill. It seems to have been admitted in the argument, that, unless the indorser has placed himself in the shoes of the maker, this averment and proof cannot be dispensed with. This was properly admitted, upon the ground already stated, that, as the indorser had engaged to pay what was not his own debt, at a certain time and place, the demand is an essential part of the plaintiff's title, and must, therefore, be averred and proved. The question, then, really is, whether the indorser has placed himself in the shoes of the maker, by taking this indemnity. The answer must, I think, be in the negative. Had he received funds adequate to the discharge of the note, he would indeed have been in the shoes of the maker, and no demand at the place would have been essential. But how can he be said to be in the place of the maker, if the assignment is inadequate to the payment ? If he was in the shoes of the maker by reason of the assignment, he was so at the instant of that assignment ; that is to say, he was from that moment to be considered the real debtor for the whole, while he received indemnity only for a fourth ; and an indemnity, too, which might



his liability as indorser ; (j) though it would also seem that the general reason that the indorser has prevented the holder from obtaining payment of the maker might apply to the case of a general assignment, or to one for the express purpose, among

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prove inadequate even to that. Moreover, from that instant the holder would have been absolved from all necessity of making a demand, or otherwise proceeding against the maker, whatever might be his subsequent acquisitions, by descent, by marriage, by the fortune of trade, or otherwise, I cannot think this reasonable. I cannot think such an inadequate assignment can absolve the holder from his obligation to demand payment, nor is there any authority to sanction the position." It may, perhaps, be doubted whether it was exactly correct to contend that the indorser, in this case, was to be considered in the place of the maker. The question really was, whether any demand at all was necessary. If none were requisite, then it would be unimportant when or where the attempt was made. But it may also happen that an indorser would be liable without a demand, when the maker would not. Thus where a note is made payable at sight, it is necessary that it should be presented to the maker before he is liable. But suppose a demand had been waived, or excused, by the indorser. In that case he would be liable without any ; so that less would be required of the holder, as against the indorser, than as against the maker. But in *Denny v. Palmer*, 5 Ired. 610, *Ruffin*, C. J. seemed inclined to think that due notice was not waived by the mere assignment of all the maker's property.

(j) *Benedict v. Caffé*, 5 Duer, 226, 233. In this case the presentment was held insufficient, because made at an improper place. The makers had made a general assignment of their property, for the benefit of their creditors, to the indorser. The terms of the assignment were not disclosed. *Bosworth*, J. said : " If the case had disclosed the contents of the assignment, it might have appeared to be a general assignment of all the property of the assignors to the first indorser, upon trusts, and among others, to first pay all notes made by the assignors, on which he had been, or might be, made liable as indorser. If so, *Mechanics' Bank v. Griswold*, 7 Wend. 165, *supra*, p. 562, note *f*, is an authority, that neither demand nor notice would have been necessary to charge him, as indorser. But the case does not disclose the terms of the assignment." In *Creamer v. Perry*, 17 Pick. 332, by the statement of facts as given by the reporter, it appears that the maker had assigned all his property to the indorser and one other party, for the benefit of his creditors ; and that the defendant was a preferred creditor and fully secured for all his demands and liabilities. There were laches in demand and notice. The plaintiff was nonsuited. *Shaw*, C. J. said : " On the first ground, we think that the most which could be made of the evidence is, that after this note was made, but several months before it became due, the promisor made an assignment to trustees, upon trust, among other things, to secure the defendant for all debts due to him from the promisor, and to indemnify the defendant against all his liabilities. . . . We think the effect of this assignment was, to secure and indemnify him against his legal liabilities ; and as his liability as indorser on this note was conditional, and depended upon the contingency of his having seasonable notice of its dishonor, his claim upon the property depended upon the like contingency." Either the learned judge overlooked the fact that the assignment was of all the maker's property, or else, we think, this case must be considered as overruling *Bond v. Farnham*, 5 Mass. 170, which case, however, is not mentioned or commented upon. In the latter case, the assignment to the defendant was " for his security against his indorsements." This must mean " his liabilities as indorser " ; and we do not see how the two cases can be reconciled on this point.

others, of covering the indorsement; at least, parol evidence is admissible, we think, to show that the indorsements were intended to be covered.<sup>(k)</sup> It is incumbent on the party who relies upon a general assignment of all the maker's effects (no particular indorsement being specified), as a waiver of demand and notice, to prove satisfactorily that the whole estate was assigned; because this, being an exception to the general rule, should be strictly proved.<sup>(l)</sup>

It will be seen that one objection to this doctrine of waiver is, that the maker, after having made the assignment, may, by descent, by marriage, by the fortune of trade or otherwise, have come into possession of some property, and that the indorser should be entitled to the benefit of these facts.<sup>(m)</sup> These chances may be, however, among the minutiae which the law does not recognize; <sup>(n)</sup> but still, if they could be proved to exist, there are strong reasons, we think, to consider them as doing away with the waiver.

The right of an indorser to receive notice, when he has possessed himself of all the property of the maker or acceptor, must be determined by different principles from those which apply to the case of an indorser to whom the maker or acceptor has assigned special property by way of security for his indorsement.

There are many cases in which this matter of taking security before maturity, by the indorser, is discussed; and there is no little confusion and uncertainty in the law on this point. According to some authorities, if the indorser, before maturity, obtain from the maker effects sufficient to secure the whole liability incurred by him on account of any particular indorsement, and the effects are received for that purpose, both de-

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<sup>(k)</sup> *Bank of South Carolina v. Myers*, 1 Bailey, 412, *supra*, p. 561, note *f*.

<sup>(l)</sup> *Duvall v. Farmers' Bank*, 9 Gill & J. 31. See *Denny v. Palmer*, 5 Ired. 610.

<sup>(m)</sup> *Tucker, P.*, *supra*, p. 565, note *i*. *Carr, Cubell, JJ.*, *supra*, pp. 563, 564, note *h*.

<sup>(n)</sup> This objection does not seem to have been much considered by the courts in the cases cited *supra*. *Brooke, J.*, in his dissenting opinion, in *Watkins v. Crouch*, 5 Leigh, 522, 539, said: "If there was any new accession of property, he was as well prepared to take care of himself as if the note had been duly presented." In *Kramer v. Sanford*, 4 Watts & S. 328, *Gibson, C. J.* said: "The chance of the maker's acquirement of other property, to which he might resort, if the funds in his hands should fall short, is so inconsiderable as to fall within the maxim *de minimis*."

mand and notice are waived; on the ground that the indorser has, by his own act, obtained all the benefit which the law of demand and notice confers, and that therefore there is no reason for the requirement of these conditions.<sup>(o)</sup> It seems to be clear,

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(o) In *Bond v. Farnham*, 5 Mass. 170, *Parsons*, C. J. said: "We do not mean to be understood that, when an indorser receives security to meet particular indorsements, it is to be concluded that he waives a demand or notice as to any other indorsements. But we are of opinion that, if he will apply to the maker, and, representing himself liable for the payment of any particular indorsements, receives a security to meet them, he shall not afterwards insist on a fruitless demand upon the maker, or on a useless notice to himself, to avoid payment of demands which, on receiving security, he has undertaken to pay." This can only be considered as a *dictum* with reference to the point now under consideration, and it does not appear clearly what the language really means. In *Mead v. Small*, 2 Greenl. 207, the head note is as follows: "If the indorser of a note has protected himself from eventual loss by taking collateral security of the maker, it is a waiver of his legal right to require proof of demand on the maker, and notice to himself." *Mellen*, C. J. said: "It appears the maker was destitute of all personal property liable to attachment; that the defendant received and held a mortgage of the maker's real property, sufficient to secure the payment of said note; and which was made for that express purpose. These facts present a stronger case in favor of the plaintiff than those in *Bond v. Farnham*, 5 Mass. 170. There the property pledged was not a sufficient indemnity to the indorser, but it was all which the maker had. Here it is proved to be sufficient. . . . But if the indorser has protected himself from eventual loss by his own act in taking security from the maker, such conduct must be considered as a waiver of the legal right to require proof of demand and notice. And we are of opinion, accordingly, that the facts before us clearly show such a waiver in the present case." But by the facts of the case it appears that, when the defendant transferred the note to the party who transferred it to the plaintiff, it was agreed that the maker should not be sued, not having any personal property liable to attachment; and that if the latter could not pay, the note should be returned to the defendant, who held the mortgage. These facts may, as will be shown hereafter, have an important bearing on the case. In *Marshall v. Mitchell*, 35 Maine, 221, *Wells*, J. said: "If the indorser has security in his own hands fully equal to his liability, he can suffer no loss by the want of demand and notice; therefore he has been held liable, in such case, without proof of those facts. And if the security is taken before the maturity of the note, it cannot be material whether it was before or after its negotiation. In either case it furnishes an indemnity." This is also a *dictum*. There is also a *dictum* of *Hosmer*, C. J., in *Prentiss v. Danielson*, 5 Conn. 175, that, "If an indorser receives security to meet a particular indorsement, he waives a demand and notice in respect of that indorsement, but not as to any other." In *Durham v. Price*, 5 Yerg. 300, there had been laches in making demand and giving notice. There was evidence that the indorser was fully indemnified, and also promised to pay after maturity. The judge instructed the jury, if the defendant had full indemnity, or promised to pay after maturity, with full knowledge of all the facts, to find for the plaintiff. A verdict for the plaintiff was sustained. In *Barrett v. Charleston Bank*, 2 McMullan, 191, a bond and mortgage was assigned by the maker to a third party, in trust, to secure the defendant as indorser, if the maker should fail to pay the note. The notice was insufficient because it was deposited in the post-office, the indorser and holder both living in the same place. The indorser was held *Evans*, J.

however, that no court would hold such reception of indemnity to be a waiver, unless it is sufficient to entirely protect the indorser, and on this point, according to many authorities, lies the distinction between securing all the maker's effects, and an

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thought that the cases cited *supra* did not depend upon the fact that the whole of the maker's estate was assigned, but that the ground for these decisions was, that the indorser was secured. In *Stephenson v. Primrose*, 8 Port. Ala. 155, the point seems to be decided. But *Collier*, C. J. said that there might be exceptions. See also *Holman v. Whiting*, 19 Ala. 703, but in that case the assignment, which was of a judgment, was made to the defendant's attorney, and there was no evidence that the defendant either assented to or knew of it; and he was discharged on account of no demand being made, or notice given. In *Watt v. Mitchell*, 6 How. Miss. 131, the demand was made a day too late, but notice was given on the day of maturity. The defendant was indemnified by a mortgage, and was held on that ground. Evidence was offered by him to prove that the mortgage, when foreclosed, was insufficient to cover the liability, but it was held inadmissible. It also appeared that the defendant had, prior to foreclosure, released a part of the mortgaged property. The court said: "We are of opinion that this evidence was properly ruled out. The question is, whether an indorser, who obtains indemnity for his indorsement from his principal, does not thereby dispense with notice of demand and refusal to pay. We think he does, and especially under the circumstances of this case. Here the indorsers obtained a formal mortgage of a very large amount of property, and had the same recorded, as an indemnity against their several undertakings and liabilities; and that they actually, of their own accord, released to their principal a large portion of the mortgaged estate, without any agency or consent of the holder of this note; and if the property remaining in their hands proved insufficient to indemnify them, it was their own fault, and not binding on the holder of the paper." In *Walker v. Walker*, 2 Eng. Ark. 542, the second indorser of a bill had received ample indemnity from the first indorser. The judge charged the jury, if they believed that the indemnity was then taken, and was at that time sufficient, to find for the plaintiff, although he had received no notice, notwithstanding the indemnity afterwards became doubtful as a means of security. The instructions were held correct. *Oldham*, J. said, after referring to the rule with respect to indemnity: "It is contended by the plaintiffs in error that this rule extends only to cases 'where there are but three parties, the drawer, indorser, and payee, and the indorser takes from the drawer an assignment for the express purpose of paying the bill, and thereby making a demand on the drawer fruitless, and becoming himself the real debtor.' We have taken some pains to look into the reported cases to see if this position is correct. We find that many of the cases do not go further, because the facts involved in them did not require a more extensive application of the rule." After citing several cases, the judge continued: "These cases fully establish the principle that, if the indorser take a sufficient security from the maker to indemnify him against his indorsement, it will dispense with proof of demand and notice of non-payment. But it is insisted that the security in this case was from the first to the second indorser. The same relation exists between them as between the drawer and the first indorser, and the reason of the rule applies as readily to one case as the other. And in this view we are sustained by Judge *Story*, who, after stating the general rule as between the drawer and the indorser, continues: 'It follows *a fortiori* that, if, by prior arrangements between any of the parties, the necessity of notice has been expressly or impliedly dispensed with, as between these parties, no notice need be given.' One of the defendants below received notes as an indemnity to him

assignment sufficient to cover a particular indorsement; the former circumstance rendering it immaterial whether sufficient security is taken, while the adequacy of the security is essential, to make the latter a valid waiver.(p)

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against his indorsement. The amount was amply sufficient to cover his liability; and it was proven that the makers of those notes, at the time of maturity of the bill, were good for the amount. We are consequently of opinion that the facts proven dispense with the necessity of proof of demand and notice as to that defendant, and that the instructions of the court below on that point were correct." The language used in this case is somewhat obscure, on account of confounding the words "maker" and "drawer." In *Kyle v. Green*, 14 Ohio, 495, the defendant received the note of a third person, as a part of the consideration for a tract of land which the former agreed to convey on payment of the note. The defendant had signed a title-bond, but retained the title in his own hands. The vendee was the first indorser. He had indorsed it to the plaintiff, who offered no evidence of demand and notice, on the trial. The defendant made a demand on the maker twenty days after maturity. The judge charged the jury that the indemnity absolved the plaintiff from the obligation of making demand and giving notice. Held correct. *Read, J.* said: "But the defendant insists that the bond is no indemnity, because the first indorser is discharged from the payment of the note, as he was not notified of demand and non-payment of the maker, and therefore that he cannot collect it from the first indorser; and that a court of equity would compel him to execute a deed to the first indorser, upon the ground that the plaintiff and himself had so conducted themselves respecting the note as to make it their own, and a payment to that extent by the first indorser. If this be the fact, it is the fault of the defendant. It was the duty of the defendant to see that the liability of the first indorser was fixed by notice of demand and non-payment, if it were necessary. If it were not done, the defendant cannot complain of the plaintiff. If the defendant has so conducted respecting the note as to lose the amount, the fault and the loss are his. Whether he has or not, we do not decide in this case. But if he has not, the land is an indemnity, and the court did not err in their charge to the jury." By the case of *Hall v. Green*, 14 Ohio, 497, it will be seen that the defendant was obliged to convey the land to the first indorser. In *Develing v. Ferris*, 18 Ohio, 170, the defendant had sold certain lands to the maker, and took his note in part payment therefor, but still retained the title as security until the note should be paid. He subsequently indorsed the note to the plaintiff, and on being called upon for payment, admitted that he was secured. The defendant was held without proof of demand and notice, *Hitchcock, C. J.* taking it for granted that demand was not made at the right time. *Eccleston, J., Lewis v. Kramer*, 3 Md. 265, 291.

(p) *Maine Bank v. Smith*, 18 Maine, 99, where the defendant had taken a mortgage, but it appeared that he had derived no benefit from it; *Marshall v. Mitchell*, 34 id. 227, where the defendant had taken a mortgage, but the plaintiff failed, because he did not prove it to be sufficient indemnity; *Brunson v. Napier*, 1 Yerg. 199. See *Lewis v. Kramer*, 3 Md. 265, 291. See *Spencer v. Harvey*, 17 Wend. 489, where *Nelson, C. J.* said: "Notice was supposed to have been dispensed with, on the ground that the indorser had taken indemnity of the makers, by means of a judgment, upon which execution has been issued; but it is extremely uncertain if anything will be realized out of the property. The security is already in litigation in chancery. The mere precaution, by an indorser, of taking security from his principal, has never been adjudged to operate as a dispensation of a regular demand and notice. It is no doubt a common occurrence, yet such effect has never been imputed to it. There must be

This doctrine, however, although supported by the opinions of such distinguished jurists as Mr. Justice Story(*q*) and Chancellor Kent,*(r)* we think is erroneous, and not supported by the weight of authority, or by the best considered cases. Where a party takes security, although it may be ample, the fair and proper construction is, in our opinion, that he takes it to secure his liability as indorser. Now his liability as indorser depends upon the fact of due demand and notice; and hence the agreement by the indorser's receiving the security may be regarded as to the effect that, if he is properly charged, he will employ the security to pay off the note; and if he is not properly charged, that he will return it to the maker, or to the party from whom he received it.*(s)*

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something more, such as taking into his possession the funds or property of the principal, sufficient for the purpose of meeting the payment of the note; or he must have an assignment of all the property, real and personal, of the makers for that purpose. The notice is dispensed with when funds are received, upon the ground that the object for which it is required to be given, namely, to enable the indorser to obtain indemnity from his principal, has already been attained. Partial or doubtful security falls short of this, and leaves the reason of the rule requiring notice in full force." See *Bruce v. Lytle*, 13 Barb. 163; *May v. Boisseau*, 8 Leigh, 164; *Warder v. Tucker*, 7 Mass. 449, *Burrows v. Hannegan*, 1 McLean, 309.

(*q*) Story on Prom. Notes, § 357; Story on Bills, § 374.

(*r*) 3 Kent, Com. 113.

(*s*) This seems to have been the principle upon which *Creamer v. Perry*, 17 Pick. 332, where the assignment was made to trustees was decided. The plaintiff was nonsuited, on account of laches in demand and notice, although the defendant had taken an assignment. See the facts and remarks of *Shaw, C. J.*, cited *supra*, p. 566, note *j*. In *Woodman v. Eastman*, 10 N. H. 359, the defendant had taken a mortgage from the maker to secure the note in suit and another. Held no waiver of demand and notice. *Parker, C. J.* said: "An indorser of a note who holds a mortgage for its security, unless there is, at the time of the indorsement or afterwards, some other evidence of waiver, seems to have the same right to be exonerated by the neglect of the holder as any other indorser. In such case, if there was but one note secured by the mortgage, the indorsee would either be entitled to the benefit of the mortgage, upon the ground that it passed as an incident; or the mortgage would be destroyed by the transfer of the note, and the holder would have a right to attach the land. If there were other lands secured by the mortgage, and retained by the mortgagee, it might be different; but that could not change the nature of the case. If by the indorsement the note was so separated from the mortgage that the latter was no longer a security, the indorsee might attach the equity of redemption. In either case, there would be nothing to show that it was within the contemplation of the parties that the right to require demand and notice should be waived, and of course nothing to show even an implied agreement to that effect." It will be observed, however, that there was evidence in this case that the mortgage had been transferred to the plaintiff, and that the defendant afterwards got possession of it improperly. In *Holland v. Turner*, 10 Conn. 308, the indorser held the goods, for which the note was given, as security. He was discharged on account



It is also very difficult to see why the mere fact of taking in-

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of laches in giving notice. *Bissell, J.*, said: "We have shown what was the nature and character of the defendant's undertaking; that it was a conditional and not an absolute engagement. We have seen upon what conditions he might be held answerable; and that, in the event of his being compelled to pay the note, he would have a right of recourse to the maker. He has taken security to indemnify himself against that undertaking. Can it then be seriously contended that the fact of taking such security is to change entirely the character of the undertaking? To convert it from a conditional to an absolute one? When the defendant indorsed the note, he was entitled, in his character of indorser, to notice. Is there any reason why his subsequently having taken a security should deprive him of a right to which he was entitled when the indorsement was made? From the fact that no notice was given, he would have a right to presume that the note was paid by the maker, and might thus be induced to part with his security." See the remarks of *Nelson, C. J.*, in *Spencer v. Harvey*, 17 Wend. 489, cited *supra*, p. 570, note p. So *Ingraham, J.*, in *Taylor v. French*, 4 E. D. Smith, 458, said: "Mere security for the indorsement affords no reason for dispensing with demand. On the contrary, it furnishes a stronger reason why the indorser, who holds security, should be informed of the non-payment. Without notice thereof, he might suppose it to have been paid, and in consequence of such neglect have parted with his security." In *Seacord v. Miller*, 3 Kern. 55, the defendant had, six months before maturity, taken a mortgage of personal property of the maker. The demand and notice were premature, and the defendant was discharged. It did not appear whether the mortgage was sufficient indemnity, but the court did not lay much stress upon the fact. *Gardiner, C. J.* said: "The security given in this case was designed as an indemnity against a contingent liability. It did not change the nature of the original contract, or amount to a performance of a condition precedent upon which that liability depended. I do not perceive how, upon the principle upon which this case was decided (in the lower court, rendering judgment in favor of the plaintiff), an indorser could ever take an adequate security without converting a conditional into an absolute contract for the payment of the money mentioned in the note. Where the fund is deposited by the maker and accepted by the indorser for the purpose of paying the demand, the case may be different." The subject was very ably discussed in *Kramer v. Sandford*, 4 Watts & S. 328. In that case the plaintiffs failed to give notice. Five months before maturity the makers executed a judgment bond to the defendant in the penalty of \$18,000, with a condition annexed, reciting that the defendant was an indorser for the makers to the amount of \$9,000, and that they would indemnify and save him harmless from all his responsibility. A judgment had been entered on the bond, and a *fieri facias* issued and levied on personal property. The plaintiffs proved that the property was sufficient to secure payment of the judgment. The indorser was discharged. *Gibson, C. J.*, after referring to the fact that an assignment of all the maker's estate constitutes a waiver, said: "But the supposed waiver of notice, in consideration of a chose in action given as a collateral security, contingent and inadequate to produce perfect safety, as every chose in action must be, stands on a less firm foundation. The acceptance of such a security is never thought to be a waiver by the parties themselves, though it is frequently a motive for the act of indorsement. Collateral security is cumulative in its very essence; and it is never suffered to impair the obligation of the contract immediately between the parties. It may be accepted, though known to be inadequate at the time, the indorser relying for the rest on the maker's other means, and his own energy of pursuit, when warned of the necessity of exerting it; and it would be contrary to the understanding of the parties to make the acceptance of such



demnity, which is an act entirely distinct from, and unconnected

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a security a substitute for notice. There can be no presumptive waiver of notice where there has been no waiver of recourse to the maker; and the acceptance of a security is not such, unless it has been taken in satisfaction. Notice may be necessary to make the very security available on which the indorser is supposed to have relied, but which he may have reserved for the critical moment. A judgment bond, which was the security in this instance, is seldom entered up immediately; and the indorser ought to have notice when the time for action has arrived; for by the delay of a day or an hour the golden opportunity may be lost. The banks often take such bonds, ostensibly for their own security, but to be entered at the request of the indorsers; yet no one ever thought that the indorsers were therefore not to have notice. The practice is very common. In this case there was no real estate to be bound, and an immature judgment would have been fruitless; but there was the more need of notice of dishonor to expedite an execution, when the time came, against the maker's personal property. He was an indorser of accommodation paper; and, as a surety is held to nothing which is not explicitly exacted by his contract, he is not presumed to have relinquished any of its privileges. This doctrine of waiver in consideration of a security has no footing in Westminster Hall; for the indorser in *Corney v. Da Costa*, (1 Esp. 302, *supra*, p. 561, note *f*,) which has been referred to as the germ of it, received effects from the drawer to the amount of the note, and thus became the party to take it up. The property was put into his hands avowedly for that purpose, and he consequently took the place of the principal debtor. . . . I grant that, where the security is money or effects, put into his hands to satisfy the debt, he changes place with the maker, and loses his original character; he is no longer an indorser, and cannot claim the privileges of one. But no judge has said that a chose in action transferred to meet, not the note at its maturity, but the contingency of the indorser's eventual liability, dispenses with notice to him; or that, as a collateral security, it is a waiver of his recourse to the maker. . . . It would seem that Chancellor Kent's conclusion from these authorities, 3 Com. 113, that notice is not required where the indorser has protected himself by an assignment or collateral security, is not sustained by them, as a principle applicable to all cases in every variety of circumstances. The true criterion seems to be the obligation to take up the note. When that remains with the maker, it continues to be the duty of the indorsee to apprise the indorser of the maker's default; where it has devolved on the indorser himself, he needs no notice. Certainly a bond and warrant taken, to be held in reserve, cannot turn his contingent responsibility into an absolute one, and dispense with performance of the condition of demand and notice as part of the title." In *Moore v. Coffield*, 1 Dev. 247, the defendant had sold a tract of land to the maker and taken the note of the latter, who also executed a deed of trust to secure the defendant for the payment of the note. Held no waiver of due demand. In *Denny v. Palmer*, 5 Ired. 610, the makers had assigned to a third party as trustee property sufficient, it seems, to cover the liability of the defendant. The latter was discharged, because notice was sent to the wrong post-office. In *Dufour v. Morse*, 9 La. 333, the notice was delivered to a person who was not shown to be authorized to receive it. The indorser took a mortgage of the maker as security, when he indorsed. He was discharged. *Martin, J.* said: "Here the indorser received nothing but a mortgage for his indemnification. He might well expect that the duty and interest of the maker would prompt him to prevent the protest of the note. He knew that the only obligation he had incurred towards the holder of the note was to pay it in case the maker did not, and after being duly and legally notified of the failure and neglect of the maker to take it up. Towards the latter, the indorser incurred no obligation. The mortgage was a useless paper in the hands of

with, the note itself, should have the effect of changing the undertaking of the indorser from a conditional to an absolute one. *(t)*

The additional reason has been given, that notice may be essential to the indorser, in order that he may take the proper steps to render his security available, and a delay may often be as prejudicial in this respect as when no indemnity at all has been taken. *(u)* Stress has sometimes been laid on the particular kind of the security taken, such as choses in action and the like; *(v)* but we doubt whether this should make any difference in the law. The fact that the security is conveyed to a trustee, instead of directly to the indorser, has also been somewhat relied upon, *(w)* but there does not appear to be any good reason why this fact should change the character of the act.

The answer to the objection, that the whole object in requiring notice is attained as soon as the indorser is indemnified, is, in our opinion, that, whatever may have been its effect in the gradual formation of the law, the requirement of notice has at last settled down into a strict technical right, and an appeal to original reasons has become less frequent and less influential.

If, however, there is anything in the acts or words of the indorser, at the time the security is received, which, by fair construction, imply or show an agreement by him to consider

the defendants. The inchoate and conditional obligation which resulted from the indorsement never became perfect and absolute. The indorser, nor those who represent him in this case, have not suffered, nor can they now suffer any injury, for the indemnification of which they could resort to the mortgage. The defendants are precisely in the same situation as they would be if no mortgage had been taken."

*(t)* *Bissell, J., supra*, p. 572, note *s*; *Gardiner, C. J., id.*

*(u)* *Bissell, J., supra*, p. 572, note *s*; *Ingraham, J., id.*; *Gibson, C. J., id.*

*(v)* *Gibson, C. J., supra*, p. 572, note *s*. In *Dufour v. Morse*, 9 La. 333, *Martin, J.* said: "It is contended, that, as the indorser was secured against any loss, there was no necessity of giving him any notice. This may be the case where a creditor is secured against the effect of the indorsement by the receipt of a sum of money, other notes, bills, or property. In such a case he may be viewed as having undertaken to apply the money he had received, or that which the notes, bills, or other property may afford him the means of obtaining, to the discharge of his conditional obligation. He may be viewed as an agent who has undertaken to pay, and therefore cannot be said to be disappointed if his principal, relying on the performance of the obligation of his friend, takes no further steps for the payment of the note." In *Bruce v. Lytle*, 13 Barb. 163. 166, *Hand, J.* said: "But if the indemnity is only by way of lien, or by a counter bond, it seems to me there should be an express promise."

*(w)* *Ruffin, C. J., in Denny v. Palmer*, 5 Ired. 610, 630.

himself the party primarily liable on the note, and directly responsible for its payment, the case is entirely different, and in this point of view only we think that taking the security operates as an extinguishment of his right to demand and notice. In other words, and in the language of Chief Justice Gibson, (x) "the true criterion seems to be the obligation to take up the note." (y) We should be glad to see a peremptory rule established, that notice should always be given, unless the indorser is under an unconditional obligation to take up the note.

## SECTION IV.

### OF EXCUSES FOR NON-NOTICE, GROUNDED ON A WAIVER OF THE RIGHT TO REQUIRE NOTICE.

THE excuses for non-notice, grounded on a waiver — actual or constructive — by the party entitled to require notice, are so numerous, and rest on such a great variety of circumstances, that it is thought best to present them under different heads. These will be, 1. when the waiver is in writing on the note or bill; 2. when it is inferred from acts of the drawer or indorser;

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(x) *Kramer v. Sandford*, 4 Watts & S. 328, 331, cited *supra*, p. 572, note s.

(y) This seems to have been one of the principles upon which *Corney v. Da Costa*, 1 Esp. 302, *supra*, p. 561, note f, was decided, as appears from the language of *Buller*, J., although it may have been that all the maker's property was assigned. *Parke*, B., in *Carter v. Flower*, 16 M. & W. 743, 751, cited the case as authority for the remark that "The cases in which the indorser has been held liable without notice have had some other material circumstances, as, for instance, that he had funds put into his hands by the drawer, out of which he was to pay the bill or note. *Mead v. Small*, 2 Greenl. 207, *supra*, p. 568, note o, may be sustained upon this ground. See the remarks of *Parker*, C. J., in *Woodman v. Eastman*, 10 N. H. 359; *Gibson*, C. J., *Kramer v. Sandford*, 4 Watts & S., 328, *supra*, p. 572, note s; *Martin*, J., *Dufour v. Morse*, 9 La. 333, *supra*, p. 574, note v; *Hand*, J., in *Bruce v. Lytle*, 13 Barb. 163, *supra*, p. 574, note v; *Martel v. Tureaud*, 18 Mart. La. 118, where there was an assignment and a promise, and the indorser was held, without notice; *Taylor v. French*, 4 E. D. Smith, 458, where the indorser was held, although the check was protested prematurely, he having on the day of protest told the holder that the drawer could not pay, having made an assignment, in which he, the indorser, was preferred. See *Coddington v. Davis*, 3 Denio, 16, *infra*, p. 578, note g. In *Moon v. Haynie*, 1 Hill, S. Car. 411, the plaintiff proved that, at or about the time the note fell due, the defendant, an indorser, sent him a message that he, the defendant, "had taken back from the maker the land for which the note was given, and that he had become paymaster for the amount to the plaintiff, but that he did not mean to pay it, as the property received for it was not as represented by the plaintiff." No demand and notice were held necessary.

3. where the waiver occurs on the day of maturity; 4. where it occurs after maturity; 5. by whom the waiver is made; 6. to whom the waiver is made; 7. of presumptive evidence in the question of waiver.

1. *When the Waiver is in Writing on the Note or Bill.*

Demand and notice may be waived by an indorser's writing over his signature the words, "I waive demand and notice," (a) or "waiving demand and notice." (b) Any other words, which by fair and reasonable construction imply an intent to waive demand and notice, will have this effect, (c) we think; although there is authority to the effect that such waivers are to be construed strictly. (d) There is conflicting authority on the point whether the words, "I waive protest," on a note or an inland bill, constitute a waiver of both demand and notice, or not. It seems to have been held by high authority, that these words alone, on a promissory note, are so uncertain as not to imply a waiver of demand and notice, except in connection with other words and acts, from which such an intent can be inferred. (e)

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(a) *Woodman v. Thurston*, 8 Cush. 157.

(b) *Johnston v. Searcy*, 4 Yerg. 182, where the indorser was held, although the plaintiff neglected to sue for more than fifteen months after maturity, during which time the maker was solvent, but after which he had failed.

(c) *Weston*, J. said, in *Fuller v. McDonald*, 8 Greenl. 213: "It is not necessary that a waiver should be direct and positive. It may result by implication from usage, or from any understanding between the parties, which is of a character to satisfy the mind that a waiver is intended."

(d) *Wall v. Bry*, 1 La. Ann. 312; *Bird v. Le Blanc*, 6 La. Ann. 470, where *Eustis*, C. J. said: "It is not desirable, in a mercantile community, that the defaults to pay bills or notes when due should be kept secret. It enables insolvents to maintain a false credit. We have had cases before us in which the waivers of protest have been the means of misleading the public as to the real situation of parties, and producing great injury thereby; and this is a strong reason for holding to the old rule, and not encouraging waivers of protest by giving them a large construction."

(e) In *Union Bank v. Hyde*, 6 Wheat. 572, the writing, signed by the indorser, was in the following words: "I do request that hereafter any notes that may fall due in the Union Bank, on which I am, or may be, indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been, or should be, legally protested." This was held a waiver of demand and notice, both parties having had a course of dealing founded on that construction. *Johnson*, J. said: "Two constructions have been contended for, the one, literal, formal, and vernacular; the other, resting on the spirit and meaning, as a mercantile and bank transaction. . . . By some assumed analogy, or mistaken notions of law, this practice of protesting inland bills has now become very generally prevalent; and since the inundation of the country

These words have also been held to constitute a waiver of de-

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with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon notes, a solemnity, cogency, and legal effect have been given to such protests in public opinion which certainly has no foundation in the law merchant. The nullity of a protest on the legal obligations of the parties to an inland bill, is tested by the consideration that, independently of statutory provision, if any, exists anywhere, or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser into an absolute assumption. The protest belongs altogether to foreign mercantile transactions, upon which, on the contrary, it is an indispensable incident to making the drawer of a bill or indorser of a note liable. On foreign bills, it is the evidence of demand, and an indispensable step towards the legal notice of non-payment, in consequence of which the undertaking of the drawer or indorser becomes absolute. Hence, as to foreign transactions, it is justly predicated of a protest, that it has a legal or binding effect. But the writing under consideration has a reference exclusively to inland bills, and as to them the protest has no legal or binding effect. The indorser became liable, only on a demand and notice, and of these facts the protest is no evidence. How, then, shall the waiver of the protest be adjudged a waiver of demand and notice, or, in effect, convert his conditional into an absolute undertaking? Had the defendant omitted one word from his undertaking, it would have been difficult to maintain an affirmative answer to this proposition. But what are we to understand him to intend, when he says, 'I will consider myself bound in the same manner as if said notes had been or should be legally protested'? Except as to foreign bills, a protest has no legal binding effect, and as to them it is evidence of demand, and incident to legal notice. It either, then, had this meaning, or it had none. This reasoning, it may be said, goes no farther than to a waiver of the demand; but what effect is to be given to the word "bound"? It must be to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill an obligation to take it up, protest alone is not sufficient; he is still entitled to a reasonable notice in addition to the technical notice communicated by the protest. To bind him to pay the debt, all these incidents were indispensable, and may therefore be well supposed to have been in contemplation of the parties when entering into this contract. It is not unworthy of remark, that the writing under consideration asks a boon of the plaintiff for which it tenders a consideration. It requests to be exempted from an expense, exposure, or mortification, on the one hand; and, on the other, what is tendered in return? The intended object, and conceived effect, of the protest, on the one hand, is to convert his undertaking into an unconditional assumption, and the natural return is to make his undertaking at once absolute, as the effectual means of obtaining the benefit solicited. If this course of reasoning should not be held conclusive, it would at least be sufficient to prove the language of the undertaking equivocal; and that the sense in which the parties used the words in which they express themselves may fairly be sought in the practical exposition furnished by their own conduct, or the conventional use of language established by their own customs or received opinions. On this point, the evidence proves that, by the understanding of both parties, this writing did dispense with demand and refusal; that the company, on the one hand, discontinued their practice of putting the notes indorsed by the defendant in the usual course for rendering his assumption absolute, and the defendant, on the other, continued up to the last moment to acquiesce in this practice, by renewing his indorsements without ever requiring demand or notice. This was an unequivocal acquiescence in the sense given by the company to his undertaking, and he cannot be permitted to lie by and lull the company into a

mand, but not of notice, (*f*) the courts adopting, in this instance, the strict construction. But there is authority to the effect that a waiver of protest is a waiver of both demand and notice; (*g*) because the term "protest," although, in its strict sense, appli-

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state of security, of which he might at any moment avail himself, after making the most of the credit thus acquired."

(*f*) *Wall v. Bry*, 1 La. Ann. 312, where the writing was in these words: "We hereby waive protest, and acknowledge ourselves as fully bound for the within note, as if the same was legally protested." *Bird v. Le Blanc*, 6 id. 470, where the words were, "I hereby waive protest on the within note."

(*g*) See *Coddington v. Davis*, 1 Comst. 186, 3 Denio, 16. The instrument was as follows: "Please not protest T. B. Coddington's note, &c., and I will waive the necessity of the protest thereof." There were other circumstances in the case, but *Jewett, J.*, in the Supreme Court, expressly says that the writing was a sufficient waiver of notice, and the Court of Appeals founded their decision upon it. *Gardiner, J.* said: "The term 'protest,' in a strict technical sense, is not applicable to promissory notes. The word, however, as I apprehend, has by general usage acquired a more extensive signification, and, in a case like the present, includes all those acts which, by law, are necessary to charge an indorser. When among men of business a note is said to be protested, something more is understood than an official declaration of a notary. The expression would be used indifferently to indicate a series of acts necessary to convert a conditional into an absolute liability, whether those acts were performed by a mere clerk or a public officer. It is obvious that the word was used in its popular acceptance by the defendant below. He requests the indorsees 'not to protest the note, and that he would waive the necessity of protest thereof.' The protest to which the indorser alluded was something 'necessary' to be done; something also for the benefit of the indorser, for he assumed to waive it. It could not, therefore, be a memorandum, or a declaration made by a notary, because neither of them were required. Nor could he have intended to waive that which, whether performed or omitted, his right would in no manner be affected. The only things necessary on the part of the indorsees were, a demand of payment of the maker, and notice to the indorser. By waiving the necessity of protest, the defendant dispensed with both, or his communication is destitute of all meaning. It was argued, indeed, that the defendant might have referred to the notarial certificate authorized by statute. But this certificate is made *prima facie* evidence of a demand and notice in favor of the indorsees. It is for their benefit. The defendant, in making such reference, must have *supposed* that the certificate was *necessary evidence*, because he waives the *necessity* of a protest which, according to the argument, is equivalent to dispensing with the *necessity* of a *notarial certificate*. Now to every fair mind waiver of proof necessary to establish a particular fact is equivalent to an agreement to admit it. Whether, therefore, the defendant, by waiving the necessity of a protest, intended to dispense with demand and notice, or with the evidence of them, the result would be the same; and in either case he is concluded by his own stipulation from raising the objection taken upon the trial. I agree with the learned judge who delivered the opinion of the Supreme Court, that the circumstances attending the written stipulation of the defendant confirm this view; but I prefer to rest my opinion upon the letter alone, as furnishing *prima facie* evidence of an intent, by the indorser, to waive demand of payment and notice, to which he was otherwise entitled." See *Scott v. Greer*, 10 Penn. State, 103. In *Duvall v. Farmers' Bank*, 7 Gill & J 44, 9 id. 31, the agreement was as follows: "Whereas I am indorser of three notes, &c., and whereas,



cable to a foreign bill alone, yet, in ordinary language, means the taking of such steps as the law requires to charge an indorser. We think this the better view, for several reasons; because otherwise the agreement can have no meaning whatever; because there is no good reason why a written instrument, purporting to constitute a waiver, should be construed differently from other instruments; and from analogy to the cases respecting the form of notice, where, as has been seen, <sup>(h)</sup> the word "protest," used with reference to a note, or an inland bill, by the weight of authority, means that the ordinary steps have been taken, with regard to the note, to charge the indorser.

The words "eventually accountable," <sup>(i)</sup> "holden," <sup>(j)</sup> have been said to imply a waiver of demand and notice.

It has been said that the words "surety," or "security," placed after an indorser's name, is no waiver of demand and notice; <sup>(k)</sup> but this may, we think, be doubted. A surety on a note has liabilities essentially distinct and separate from that as indorser; and unless the fact that the name of the indorser is written on the back of the note necessarily makes him an indorser, and nothing more, which is very doubtful, we do not

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at my request, the bank which holds the said notes has agreed not to protest the same, or to ask a renewal of them when they become due, I do hereby agree to dispense with all notice of the time of payment, or of the non-payment of said notes, and to be answerable for the amount of said notes, although no such notice is given to me." Held a waiver of demand and notice as to a note not due at the time the agreement was signed.

<sup>(h)</sup> *Supra*, p. 471.

<sup>(i)</sup> *Weston*, C. J., *McDonald v. Bailey*, 14 Maine, 101; recognized by *Shepley*, J., *Burnham v. Webster*, 17 id. 50.

<sup>(j)</sup> *Bean v. Arnold*, 16 Maine, 251, where the note was overdue at the time of indorsement; *Shepley*, J., *Burnham v. Webster*, 17 id. 50; *Blanchard v. Wood*, 26 id. 358, where the note was not due at the time of indorsement.

<sup>(k)</sup> *Bradford v. Corey*, 5 Barb. 461, *Paige*, J. said: "In this case, the addition of the word 'surety' or 'security' to the indorsement of the defendants' names on the note in question did not divest them of their character of indorsers. The only effect of the addition of these words to their signatures was to give them the privileges of sureties, in addition to their rights as indorsers. As indorsers, they could not be made liable without a demand and notice; and as sureties, they were entitled to all the privileges of that character." This is, however, only a *dictum*. It is somewhat difficult to see what is meant by a party who has all the rights of an indorser with all the privileges of a surety. Previous to being charged by demand and notice, an indorser is an *indorser*, and not a surety. After the proper steps have been taken, he becomes a surety.



see why the effect of these words is not to make him a surety, and consequently not entitled to ordinary demand and notice. The word "backer," placed after the indorser's name, has also been held to be no waiver of demand and notice.<sup>(l)</sup>

In short, whatever words constitute a guaranty will be a waiver of regular demand and notice; because, as will be seen,<sup>(m)</sup> the ordinary rules with regard to demand and notice are inapplicable to guaranties. What form of words amounts to a guaranty will be considered subsequently.<sup>(n)</sup>

But although an instrument purporting to constitute a waiver is to be fairly construed, yet it cannot be extended beyond the import of its terms. Thus, a waiver of notice is not a waiver of demand,<sup>(o)</sup> because the two have meanings entirely distinct from one another, and it would be an unauthorized stretch of construction to declare them equivalent. We have seen that the words "eventually accountable" have been said to be a waiver of both demand and notice,<sup>(p)</sup> but where there are other words which limit and define these, the case may be different. Thus, "I hold myself accountable, and waive all notice," have been held to imply waiver of notice alone;<sup>(q)</sup> because all the words taken together show such to be the intent. But an agreement

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<sup>(l)</sup> *Seabury v. Hungerford*, 2 Hill, 80.

<sup>(m)</sup> *Infra*, chapter on Guaranty.

<sup>(n)</sup> *Infra*, chapter on Guaranty.

<sup>(o)</sup> *Berkshire Bank v. Jones*, 6 Mass. 524; *Dewey, J., Low v. Howard*, 11 Cush. 268, 270; *Drinkwater v. Tebbetts*, 17 Maine, 16, where the words were, "Holden without notice"; *Burnham v. Webster*, id. 50, where the words were, "I hold myself accountable, and waive all notice"; *Lane v. Steward*, 20 id. 98; *Buchanan v. Marshall*, 22 Vt. 561. See *Backus v. Shipherd*, 11 Wend. 629. *Contra*, *Matthey v. Gally*, 4 Calif. 62.

<sup>(p)</sup> *Supra*, p. 579.

<sup>(q)</sup> *Burnham v. Webster*, 17 Maine, 50, where *Shepley, J.* said: "In this case there is a waiver of notice, but not of presentment, unless the words, 'I hold myself accountable,' taken in connection with the other words used, can be considered as dispensing with a presentment. The inquiry is suggested, How accountable? And the answer would seem necessarily to be, I waive all notice, and hold myself accountable. This answer employs every word of the instrument, only transposed, and gives to each its proper meaning. To give a different answer to the question, and say, I hold myself accountable absolutely, would dispense with the words "and waive all notice," giving to them no meaning. To answer, I waive all notice and demand, would be to give greater effect to the words than the decided cases permit. The indorser may say, 'I did indeed waive all notice, and held myself accountable, but I never did waive a presentment, and now insist upon it'; and the court cannot, consistently with the decided cases, deprive him of the right to make such an answer "

by an indorser to consider himself responsible without requiring notice, if the note could not be collected of the maker by due course of law, has been held a waiver of both demand and notice.<sup>(r)</sup>

Bills may be drawn "acceptance waived." This does not deprive the instrument of its character as a negotiable bill of exchange, but its effect is simply to merge the ordinary proceedings on acceptance or non-acceptance into those of payment or non-payment.<sup>(s)</sup>

The waiver may be written upon the note or bill at the time of signing; or after that time and before maturity,<sup>(t)</sup> in which case no consideration is necessary, because the indorser would be estopped from setting up in defence a want of demand or of notice;<sup>(u)</sup> or the agreement may be upon a separate paper,

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<sup>(r)</sup> *Backus v. Shipherd*, 11 Wend. 629.

<sup>(s)</sup> See *English v. Wall*, 12 Rob. La. 132; in *Denegre v. Milne*, 10 La. Ann. 324, *Slidell*, C. J. said: "We do not consider the expression 'acceptance waived,' as stripping the instrument of the character of a bill of exchange, or depriving its signers of the character and rights of drawers of a bill of exchange. These were merely qualified, and to this extent; the insertion of these words created between the drawers and the payee, and those subsequently taking the bill, an agreement that the drawees should not be required to accept the bill upon its sight. Without these words, it would have been the holder's right to insist upon an acceptance upon presentment, protest the bills if acceptance were refused, and take his immediate recourse against the drawers. With them, he had only the right to exhibit the bill for sight, to fix the date of maturity, which was done; and was bound to wait until maturity for payment by the drawees, at which time the drawers engaged it should be paid by the drawees. Upon failure of payment, protest, and notice, the liability of the drawers, which was previously conditional, would, in general, become absolute. No adjudged case militating with this view of the rights of those parties has been referred to or cited; and we are satisfied that the construction we give would be in accordance with the understanding of men of business, and meets the understanding of the parties themselves when the bill was drawn and negotiated. The validity of the instrument as a bill of exchange, its essential character as a bill of exchange, are not destroyed by such a qualification. It is still a request to the drawee by the drawer, to pay a sum of money to the payee, or his order, absolutely, and at a time mentioned in the bill."

<sup>(t)</sup> *Wall v. Bry*, 1 La. Ann. 312.

<sup>(u)</sup> In *Wall v. Bry*, 1 La. Ann. 312, *Slidell*, J. said: "It is proved that the indorsement of the defendant was made some months anterior to the indorsement and signature of the waivers. . . . The defendant urges that it was not binding, because made without consideration. The plea that the waiver was without consideration cannot avail the defendant. It was made before the maturity of the note; the holder may have regulated his conduct, in not protesting the note, by the defendant's waiver, confiding in it; and to relieve him from it now would be sanctioning a breach of good faith, and permitting that party to gain by his own disingenuousness."

contemporaneous with, or subsequent to, the indorsement, *(v)* or even before the note is indorsed. *(w)*

## 2. *When the Waiver is inferred from Acts of the Indorser or Drawer.*

Demand and notice may be waived by an act of the indorser or drawer, calculated to put the holder off his guard, and prevent him from treating the note as he would otherwise have done. *(x)* Or where the indorser or drawer has himself been the means of preventing the note or bill from being honored. *(y)* Thus, when the indorser received a written agreement from the holder, in which the latter promised to sue the makers, and to use all due diligence to collect the note from them, demand and notice were held to be waived. *(z)* Also, where the indorser, by agreement with the holder, agreed to extend the time of payment. *(a)* Or where such agreement, for a valuable considera-

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*(v)* *Spencer v. Harvey*, 17 Wend. 489, where the indorser wrote to the holder a few days before maturity, stating that the maker had failed, acknowledging his liability, and asking an indulgence until funds could be realized from security given by the maker. Held a waiver of demand and notice. *Coddington v. Davis*, 1 Comst. 186, 8 Denio, 16; *Duvall v. Farmers' Bank*, 7 Gill & J. 44, 9 id. 31.

*(w)* See *Union Bank v. Hyde*, 6 Wheat. 572. For the words of this agreement, see *supra*, p. 576, note *c*. The case does not, however, state whether the instrument was signed before the note in suit was indorsed. See also *Duvall v. Farmers' Bank*, 7 Gill & J. 44, 9 id. 31, where there was one note not indorsed until after the agreement.

*(x)* *Gove v. Vining*, 7 Met. 212; *Spencer v. Harvey*, 17 Wend. 489; *Bruce v. Lytle*, 13 Barb. 163; *Taylor v. French*, 4 E. D. Smith, 458; *Phipson v. Kneller*, 1 Stark. 116.

*(y)* *Minturn v. Fisher*, 7 Calif. 573.

*(z)* *Kyle v. Green*, 14 Ohio, 490. In *Benoist v. Creditors*, 18 La. 522, the drawer took a receipt from the payee, in which it was agreed that the bill should not be protested, in order to save costs. The funds for which the bill was drawn were then in litigation. Held that notice to the drawer was not necessary.

*(a)* *Amoskeag Bank v. Moore*, 37 N. H. 539, where the indorser, a few days before maturity, signed the following agreement at the foot of the note: "Sept. 25, 1855. We hereby agree that the above note may be extended for sixty days from this date." On the 25th of September the makers paid the plaintiff the interest in advance for the sixty days, which was indorsed on the note as interest paid for that time. No demand was made upon the makers, either at maturity or at the expiration of the extended time. Notice had been expressly waived. The defendant was held. In *Ridgway v. Day*, 13 Penn. State, 208, the plaintiff wrote to the defendant before maturity, informing him that the maker could not probably pay, and offering to extend the time of payment. The defendant agreed, and wrote, in reply, that he was "willing to extend the time for thirty days longer, and of course will stand responsible for the payment of the note as originally intended." One or two further extensions were made. Held a waiver of all demand and notice. See also the cases cited *infra*.

tion, has been made between the maker and the indorser, and the latter has transferred the note to the plaintiff, who was wholly ignorant of the agreement.(b) So where the drawer deposited a particular kind of funds with the payee and indorser, under an agreement between the parties that the proceeds of the funds were to be applied to the payment of the bills, when due, such arrangement was held to be a waiver of presentment, and the indorser entitled to sue the drawer, if the funds were not paid according to the agreement.(c) So demand and notice are waived where the drawer of a check stops its payment at the

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(b) *Williams v. Brobst*, 10 Watts, 111. *Kennedy, J.* said: "It is further alleged in the declaration, that the defendant, after receiving the note from the maker, and before he passed it by indorsement to the plaintiff, . . . agreed to forbear payment thereof until one year after the time mentioned in the note for that purpose; and that he passed the note to the plaintiff, who was altogether ignorant of this agreement, without advising him of it." The judge, after stating that it must be taken for granted that the consideration was a valuable one, continued: "These facts show clearly that the defendant had not dealt fairly with the plaintiff, . . . by suppressing the agreement which he had previously made with the maker of the note, postponing the day of its payment. This was certainly a very important circumstance, because it rendered the note of less value, and ought, therefore, to have been disclosed by the defendant to the plaintiff at the time he offered to indorse it to him. After having made such an agreement with the maker of the note, for which he had received a valuable consideration, it would also have been a fraud in him to have permitted the maker to be called on and compelled to pay it before the time had arrived to which it was agreed between him and the maker that the payment of it should be postponed. Upon this ground, therefore, he had no right to require that the drawer should be called on first for payment, as soon as the note, according to its terms, became payable; but, on the contrary, was bound himself, in justice to the maker, to have prevented it, by calling upon the plaintiff and paying the amount thereof, so that the maker should have the benefit of the indulgence agreed on between them. . . . The reason why the law requires that the indorsee of a note or bill shall give notice to the indorser of non-payment is, that he may take the necessary measures to obtain payment from the party or parties respectively liable to him. . . . But the defendant had no right to claim notice, because if he had paid the plaintiff, and taken up the note when at maturity, according to its face, he would have had no right to demand payment of the maker for a year afterwards. It is no objection to this course of reasoning, that the plaintiff might, notwithstanding the agreement, as he was ignorant of it when he took the note, for a valuable consideration, in the ordinary course of business, have compelled the maker to pay it as soon as it came to maturity, according to its terms, because it would have deprived the maker of the indulgence which the defendant was bound to give him; and it does not lie in the mouth of the defendant to say that he ought not to be made liable himself to pay the amount of the note to the plaintiff, because the latter did not compel payment of the note from the maker, when it would have been a fraud in the defendant to have permitted it, and not to have prevented it by paying the amount thereof himself."

(c) *Curtiss v. Martin*, 20 Ill. 557.

bank where it is payable; (*d*) and the same is true, we think, with reference to the drawer of a bill who has ordered the drawee not to accept; (*e*) but there is a *Nisi Prius* case, which holds that this amounts to a waiver of notice, but not of demand. (*f*) So where an indorser obtains possession of the note before maturity, and withholds it until after that time, demand and notice are waived. (*g*)

There has been some conflict on the point whether a parol promise to pay the note, made at the time of endorsing, or a parol agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice. (*h*) Some of the earlier cases deny its admissibility, on the ground that the indorsement is a written contract that regular demand shall be made and notice given, which cannot be waived by a contemporaneous parol agreement. But we do not think this to be law, and are of opinion that the evidence may be introduced, because the contract is, not that demand shall be made and notice given, but that due diligence shall be used; and evidence is admissible to prove that such diligence has been used. (*i*) Indeed, the law seems

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(*d*) *Jacks v. Darrin*, 3 E. D. Smith, 557; *Purchase v. Mattison*, 6 Duer, 587.

(*e*) *Lilley v. Miller*, 2 Nott & McC. 257, note *a*; *Sutcliffe v. M'Dowell*, id. 251.

(*f*) *Hill v. Heap*, Dow & R., N. P. 57. *Sed quære*.

(*g*) See *Havens v. Talbott*, 11 Ind. 323. There was also a promise made by the defendant, before maturity, to pay the note.

(*h*) In the following cases it was held inadmissible. *Barry v. Morse*, 3 N. H. 132; *Hightower v. Ivy*, 2 Port. Ala. 308. In *Free v. Hawkins*, Holt, N. P. 550, 8 Taunt. 92, the evidence was rejected. The court relied upon *Hoare v. Graham*, 3 Camp. 57, as authority. But there is an obvious distinction between the two cases. In the latter, the indorser's defence was, that the suit was premature, because, although it was brought after the note matured, by a parol agreement the note was not to be sued until a subsequent period. So it is settled that a maker cannot object to a suit on the same ground. But the evidence on the point now under consideration is not offered to show that the indorser's liability accrued at a different time from that mentioned in the note, but that the proper steps required by law had been taken.

(*i*) *Barclay v. Weaver*, 19 Penn. State, 396, where *Lowrie, J.*, having decided, at *Nisi Prius*, that the evidence was inadmissible, changed his opinion after argument before the full bench. He said, the question now is: "May a party prove, by oral testimony, that, at the time of the indorsement of a promissory note, it was agreed that the indorser should be absolutely bound for the payment of it, without the usual demand and notice? This was answered in the negative, in the court below, on the principle that oral testimony cannot be heard to vary the terms of a written contract. The error consists in the assumption that the law regards an indorsement as a written contract to pay, on condition that the usual demand be made and notice given. It is

quite clearly settled, that a parol promise to pay, made by the indorser to the indorsee, at the time of, (j) or subsequent

not so. For where the indorser is himself the real debtor, as in the case of accommodation notes and bills, or has taken an assignment of all the property of the maker as security for his indorsement, or where he can have no remedy against the maker, or in the case of the drawer of a bill of exchange, where the drawee is, and during the currency of the bill continues to be, without funds of the drawer, and in many other such cases, demand and notice are not necessary; and these circumstances may be proved by parol testimony. The reason is, that in such cases demand and notice can be of no use, and therefore the law does not require them. The most, therefore, that can be said of an indorsement of negotiable paper is, that from it there is *implied* a contract to pay, on condition of the usual demand and notice; and that this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in writing. But it may well be questioned whether the condition of demand and notice is truly part of the contract, or only a step in the legal remedy upon it. If it is part of the contract, how can it be effectually dispensed with, without a new contract, for a sufficient consideration, especially after the maturity of the note? Yet there are decisions without number, that a waiver of it, during currency or after the maturity of the note, will save from the consequences of its omission. This could not be if it was a condition of the contract, for then the omission of it would discharge the indorser both morally and legally; and no new promise afterwards, even with full knowledge of the facts, could be of any validity. If, however, an indorsement, without other circumstances, be regarded as an implied contract to pay, provided the holder use such diligence that the indorser lose nothing by his negligence or indulgence, then it accords with all these decisions. Then the law, and not the contract, declares the usual demand and notice to be in all cases conclusive, and in some cases necessary, evidence of such diligence. The law imposes no vain duties, and its general rules are subjected to exceptions in order to dispense with them; but it does not thus deal with contract duties. It is, therefore, perfectly consistent in declaring that an indorser is bound by a new promise, after he knows of the omission of demand and notice; for this is an admission that he was not entitled to it, or has not suffered for want of it. It declares demand and notice necessary, in some cases, to save the indorser from loss, and it declares that his own admission may be substituted for them. It seems, therefore, that the duty of demand and notice, in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time, in accordance with the maxim, *Quilibet potest renunciare juri pro se introducto*; and certainly an indorsement is not regarded as a written contract, so far as to prevent oral proof that its terms differ from the ordinary contract of indorsement." In the following cases it was held that a waiver might be proved by parol. *Boyd v. Cleveland*, 4 Pick. 525; *Taunton Bank v. Richardson*, 5 id. 436; *Fuller v. McDonald*, 8 Greenl. 213; *Drinkwater v. Tebbetts*, 17 Maine, 16; *Lane v. Steward*, 20 id. 98; *Edwards v. Tandy*, 36 N. H. 540; *Farmers' Bank v. Waples*, 4 Harring. Del. 429.

(j) In *Boyd v. Cleveland*, 4 Pick. 525, the holder remarked to the defendant at the time the note was received, that he had no confidence in the other parties to the note, and did not know them, and should look wholly to the defendant. The defendant said he should be in New York, where the plaintiff lived, when the note became due, and would take it up if it were not paid by any other party to it. Held a waiver of notice, and that an unsuccessful attempt on the part of the plaintiff to notify the defendant did not affect the question. See *Taunton Bank v. Richardson*, 5 Pick. 436; *Fuller v. McDonald*, 8 Greenl. 213, where the indorser, at the time the note was transferred,



to, (k) the indorsement; an agreement to extend the time of

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agreed to pay the note if the maker did not, and the holder took it, relying upon the indorser's credit; *Lane v. Steward*, 20 Maine, 98, where the indorser promised to pay if the maker should not. There was also a promise subsequent to maturity. In *Wall v. Bry*, 1 La. Ann. 312, there was a verbal agreement between the indorser and the holder, that the former was to be responsible only in case payment could not be obtained from the maker. Held that notice was waived. It does not appear whether the agreement was made at the time the note was transferred or subsequently. *Contra*, *Staples v. Okines*, 1 Esp. 332. In this case the acceptor was indebted to the drawer at the time the bill was drawn, but then informed the latter that he would not be able to provide for the bill. It was understood between them that the drawer was to provide for the bill when due. Notice to the drawer was held necessary. Lord *Kenyon* said: "The law was general, only exempting the party from the necessity of giving notice where the drawee had no effects; and as here the drawee was indebted to the defendant, on whom the bill was drawn, and so in fact had effects in hand, and if he had had effects in hand when the bill became due, would have taken it up, he was of opinion that notice was necessary." So, in *Davis v. Gowen*, 19 Maine, 447, the plaintiff told the indorser, at the time the note was transferred, that he would not take the note unless the indorser would pay it at maturity, and that he would not look to any other person for it. This statement, the defendant being called on for payment, was not denied. The court said: "The defendant might have agreed to pay the note at maturity, and the plaintiff may have apprised him, when he received the note, that he relied altogether upon him; yet the agreement of the defendant must be understood to have been made with the implied reservation, that, if the maker paid, he was not to be liable. He did not discharge the holder from the duty imposed upon him, to demand payment of the maker at the maturity of the note. There is not sufficient evidence in the case to change or modify his legal liability arising from the indorsement."

(k) *Sigerson v. Mathews*, 20 How. 496, where the defendant told the plaintiff, six months after indorsing, and eighteen months before maturity, not to protest the note, as it should be paid at maturity. Held a waiver of demand and notice. *Whitney v. Abbot*, 5 N. H. 378, where the indorser told the holder, a month before maturity, it being ascertained that the makers had failed, that he should have no trouble about the note, that he, the indorser, would pay it, and was going to procure money to pay it. Held a waiver of demand and notice. *Edwards v. Tandy*, 36 N. H. 540. In *Leonard v. Gary*, 10 Wend. 504, the note was payable at ten days' notice. Demand was made on Dec. 7th, and on Dec. 12th the defendant told the plaintiff, that when he indorsed paper, he indorsed it to pay; that he would see the plaintiff paid, if it took every cent in his pocket; he asked the plaintiff to give him time; offered to give his note for the debt, payable in a year, and, whether the plaintiff would take it or not, he should be paid; and said that the plaintiff need give himself no uneasiness about it, as he would see him paid, if it came out of his own pocket. Held a waiver of demand, at the expiration of the ten days, and of notice. In *Bruce v. Lytle*, 13 Barb. 163, the defendant told the plaintiff, the day before maturity, that he would pay and take up the note in three or four days. Five days after maturity, an insufficient demand was made and notice given. The defendant was held principally on the ground that demand and notice had been waived. *Wall v. Bry*, 1 La. Ann. 312, *supra*, note j. In *Lary v. Young*, 8 Eng. Ark. 401, the attorney of the holder reminded the indorser, a few days before maturity, that the note would soon be due, and that the makers had left town. The indorser said that he owed the note; that it was all right; that he had



the payment; (l) a request made by the indorser for forbear

indorsed it to pay it; and if he was not there when it became due, that his agent would pay it. Held a waiver of demand and notice. In *Norton v. Lewis*, 2 Conn. 478, demand was made and notice given the day before maturity. But the defendant, an indorser, in consideration that the holder of the note would wait until a future period before suing, agreed to pay the note. The defendant was held. *Collamer, J., Russell v. Buck*, 11 Vt. 166, 175; *Bennett, J., id.* 182. See *Burgh v. Legge*, 5 M. & W. 418. *Contra, Davis v. Gowen*, 19 Maine, 447, where the evidence was, that the attorney of the plaintiff, on the first day of grace, demanded payment of the defendant, saying that the plaintiff had directed the note to be sued immediately. The defendant replied that he would pay it immediately, or see it paid. There was also a verbal agreement or understanding at the time the note was transferred. *Supra*, p. 586, note j. Held no waiver of regular demand and notice. In *Jervey v. Wilbur*, 1 Bailey, 453, the plaintiff's attorney, in whose hands a note had been left for collection, said to the defendant, who was an indorser of that note, that the plaintiff held other notes with his indorsement on them; and that he, the attorney, would give him no notice of the next suit before issuing process against him. The defendant replied that he wanted none; for he knew the maker was insolvent, and that the rest of the notes must be paid by himself, which he would take care to do, before they could get into the attorney's hands. Held no waiver of notice as to the notes not then due. One of the grounds, however, for the decision was, that the declaration was made to a third party, who, at the time, had no authority to represent the plaintiff. In *Baker v. Birch*, 3 Camp. 107, the acceptor told the drawer, a few days before maturity, that he could not pay the bill, and that the latter must take it up. He also gave the drawer part of the amount, to enable him to do so. The drawer received the money, and promised to take up the bill. It was held, that the drawer might still set up want of due presentment and notice in defence; and that the money received might be recovered as money had and received to the plaintiff's use.

(l) *Supra*, p. 582, note a. In *Williams v. Brobst*, 10 Watts, 111, cited *supra*, p. 583, note f, it is not stated whether the agreement was by parol or written. In *Barclay v. Weaver*, 19 Penn. State, 396, a parol agreement to extend the time of payment was held a waiver of demand and notice. In *Farmers' Bank v. Waples*, 4 Harring. Del. 429, the indorser simply asked the bank not to protest the note, saying that he would always renew his indorsement, and hold himself liable, without protest and notice. The note had been allowed to lay over several times, and had been several times renewed. Demand and notice were held to be waived. But in *Oswego Bank v. Knower*, Hill & D. 122, the defendants had given to the maker several blank indorsements, without the notes being filled up. The maker had used them for the purpose of procuring discounts at the bank of which he was president. The notes in suit grew out of accommodations at the bank, for the benefit of the maker, which had commenced several years before these notes were made, which notes were given in consequence of various renewals made from time to time. None of the notes had been protested, by direction of the president. The judge charged the jury, that, if the defendants knew that the previous notes, the predecessors of those in suit, fell due, and they received no notice, and then again indorsed the notes given in renewal, that they might infer a waiver of notice in respect to the note in question. This charge was held incorrect. *Nelson, C. J.* said: "Suppose a power of attorney had been given to use the name of the defendants' firm as accommodation indorsers, which would have been no very uncommon case, could the idea have been entertained, for a moment, that the simple indorsement would have made them absolutely liable, or laid any foundation for such an inference? I apprehend

ance ; (m) an agreement with a bank at which a note is discounted, to attend to and take care of it, with directions that the bank notice for the maker should be sent to the care of the indorser, even though the agreement is made before the time of delivering the

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nobody would contend for the proposition. And these blank indorsements are nothing more than a standing power to that effect. If the defendants had intended to dispense with notice, they would have signed, as makers, at once, and become absolutely bound. The very fact of confining their security on the paper to the character of indorsers, shows that they meant to limit their liability accordingly, and to be entitled to all the benefits incident to it. An indorsement in blank, in judgment of law, is as precise and distinct, and as well known and understood, as if the liability or condition of the usual demand and notice had been written out upon the back of the paper ; and nothing short of the clearest evidence of the assent of the defendants, express or implied, should be regarded as sufficient to waive the condition or change the nature of the contract, making it an absolute instead of a conditional one. Upon the whole, I am satisfied that, to allow the circumstances put forth here, whether taken separately or in the aggregate as laying the foundation for an inference of a waiver of demand and notice, would be going farther than any case has yet gone in dispensing with the contract of the indorser, and farther than will be consistent with the uniformity and stability of the law, so important in respect to commercial paper. Indeed, if we analyze the facts in the case, and reduce them to the particulars bearing upon the defendants, and for which they may properly be held responsible, it will be found that there is little else in it deserving the name of evidence, independently of the unlimited power given to the brother to use the name of their firm as indorsers, leading, even in the remotest degree, to an assent to the waiver. And we can hardly be expected to infer it from the fact that the power given to indorse is a general one. On the contrary, we suppose that the limitation of the liability assumed to that of indorsement, and that only, shows clearly enough an intention to stand upon the paper in that character, and in *that only*, however extended and onerous the liability might become."

(m) *Leffingwell v. White*, 1 Johns. Cas. 99, where the indorser informed the holder that the maker had absconded, and said that, being secured, he would give a new note, and requested time. While these negotiations were pending, the note fell due. Demand and notice were held to be waived. *Gove v. Vining*, 7 Met. 212, where the note was payable at either bank in Boston. On the first day of grace the holder sent a messenger with the note, and a written notice to the indorser requesting payment, to the house where the maker and indorser both resided. The maker was absent, but the indorser read the notice, and told the messenger that the maker would see the holder in a short time, and expressed a wish that the note should not be sued until the indorser should see the holder. No demand was afterwards made of the maker, nor any notice given to the indorser. *Shaw, C. J.* said : " Although this was stated as the request of the promisor, yet it was made by the indorser, without any restriction or qualification on her part, and therefore may be considered the same as if it were her own. It was, therefore, a request by the indorser to the holders, through their agent, with full notice that the note was then nominally due, though not legally payable till three days after, for forbearance of payment. It was calculated to induce the holder to believe that the parties who were liable were about making some arrangement or some proposal by which it would be paid, if he would forbear resorting to coercive measures for a short time. And the court are of opinion that, when the indorser, at or shortly before the time when the note becomes due, says to the holder that an arrangement for its pay-

indorsement; (*n*) an agreement by the indorser with the maker, to pay the note and to take it back into his own hands; (*o*) an agreement by the indorser to pay, if the note could not be collected of the maker by due course of law; (*p*) a verbal agreement between the indorser and the indorsee, by which the latter agreed to inform the maker of the indorsement, and to wait six months after maturity before making cost upon the note; (*q*) a refusal by the drawer to give his address, with a declaration to the holder that the acceptor would not pay, coupled with a promise to call in a few days to inquire whether the bill had been paid or not; (*r*) a declaration by the drawer of a check, who was the paying teller of the bank on which it was drawn, three days before maturity, that the check would not be paid; (*s*) part payment of a check before maturity, as it would seem; (*t*) a declaration by the indorser of a check to the holder, that the maker cannot pay, that the latter has made an assignment, and has therein preferred him; (*u*) all have respectively been considered as a waiver of demand and notice.

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ment is about being made, and in direct terms or by reasonable implication requests the holder to wait and give time, it amounts to an assurance that the note will be paid, that the promisor or indorser will pay it, and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place; and it would be contrary to good faith to set up such want of demand and notice, caused perhaps by such forbearance, as a ground of defence." But in *Sussex Bank v. Baldwin*, 2 Harrison, 487, 495, the defendant sent a letter to the cashier of the bank a week or two before maturity, stating that the maker could not pay, and requesting that the note might be renewed. The defendant was discharged for want of proof of notice.

(*n*) *Taunton Bank v. Richardson*, 5 Pick. 436. Held a waiver of demand and notice, or at least evidence from which a jury might infer such waiver.

(*o*) *Marshall v. Mitchell*, 35 Maine, 221. Held a waiver of demand and notice.

(*p*) *Backus v. Shipherd*, 11 Wend. 629.

(*q*) *Drinkwater v. Tebbetts*, 17 Maine, 16, where notice was waived.

(*r*) *Phipson v. Kneller*, 1 Stark. 116, 4 Camp. 285, where notice was waived. Lord *Ellenborough* said: "No legal proposition can be more clear than that, where a party says, 'My residence is immaterial, I will inquire whether the bill is paid,' he thereby takes upon himself the onus of making inquiry, and dispenses with notice."

(*s*) *Minturn v. Fisher*, 7 Calif. 573.

(*t*) In *Levy v. Peters*, 9 S. & R. 125, 128, *Tilghman*, C. J. said: "If one draws a check on a bank, payable some time after date, and before the time of payment the drawer pays part, I should suppose it must be the intent of the parties that the check should not be presented. I doubt whether the bank would pay the balance in such case, without a special order from the drawer, or some written explanation. On this point, however, I give no opinion, as the case does not require it"

(*u*) *Taylor v. French*, 4 E. D. Smith, 458.

Whether acts other than a promise to pay will constitute a waiver or not has been also somewhat discussed. Thus, where an indorser, after maturity, agreed with the maker to take up the note, to give back to him the property for which the note was given, and to return the note without further consideration, this was held to constitute a waiver of demand and notice.<sup>(v)</sup> A confession of judgment has also been held admissible evidence of waiver, but not conclusive.<sup>(w)</sup> Where the drawer of a bill which had been duly presented, but was unpaid, gave the holder his own note for the amount, it was held that it was no defence to the note to prove laches in giving notice of non-payment of the bill; <sup>(x)</sup> but the giving of a bond would seem to have been held to be only *prima facie* evidence of waiver.<sup>(y)</sup> So where the drawer himself undertakes to present a bill after maturity,<sup>(z)</sup> although inquiries and attempts by an indorser to induce the maker to pay have been held not to be a waiver.<sup>(a)</sup> The fact that an indorser appeared at the meeting of the creditors, and assumed the character of a creditor for a large sum,

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<sup>(v)</sup> *Andrews v. Boyd*, 3 Met. 434, where the defendant had sold the maker a vessel for \$2,800, of which \$800 was paid in cash, and the remainder by two notes for \$1,000 each. The defendant offered evidence to show that the vessel, from fall in prices, and from wear and tear, was not worth the amount of the notes. Held immaterial. *Shaw*, C. J. said: "When the indorser took back the property which was the original consideration for the notes, and agreed in express terms with the promisors that he would pay and take up the note now in suit, and deliver it to them without further consideration, and this after the note became due, and after he must have known whether he had received due notice of its non-payment or not, we cannot perceive why this is not evidence from which a jury might properly infer that he had received due notice of the non-payment of the note from the holder. But if this were not clear, we are of opinion that, when the indorser took the property of the promisors into his own hands, being either of sufficient amount and value to pay the note, or perhaps being all they could give him; and when, with such funds as they did furnish him with, he agreed absolutely to pay and take up the note on which he stood as indorser, without further consideration from them, it was a waiver of notice on his part."

<sup>(w)</sup> See *Richter v. Selin*, 8 S. & R. 425, where *Duncan*, J. said: "The confession of judgment may be evidence of an acknowledgment of liability, but is not conclusive evidence. It is not a legal presumption. It is capable of being explained and repelled by the circumstances under which it was given. But if the defendant confessed the judgment by any false suggestion of the drawers, and on the faith of a valid security to indemnify him, which security was found to be immediately worthless, . . . all this would be evidence to repel the presumption arising from the judgment and security."

<sup>(x)</sup> *Leonard v. Hastings*, 9 Calif. 236.

<sup>(y)</sup> *Ralston v. Bullitts*, 3 Bibb, 261; *Mills v. Rouse*, 2 Littell, 203.

<sup>(z)</sup> See *Cram v. Sherburne*, 14 Maine, 48.

<sup>(a)</sup> *Hussey v. Freeman*, 10 Mass. 84.

including the note sued on, has been held no waiver of demand and notice ; (b) but we should say that it might be regarded as evidence of such waiver.(c)

Whether particular conversations amount to a waiver or not has been held to be a question of fact for the jury, and not one of law for the court,(d) but it has also been said that questions

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(b) *Miranda v. City Bank*, 6 La. 740.

(c) See *Martin v. Ingersoll*, 8 Pick. 1.

(d) *Union Bank v. Magruder*, 7 Pet. 287, where *Story, J.* said : " The plaintiffs, on the foregoing evidence, prayed the court to instruct the jury as follows : ' That, if the jury believe the defendant held the above conversations as stated by the witnesses, such conversations amount to a waiver of the objection of the want of demand and notice ; and the defendant is liable on the note, if the jury should believe that the defendant made the acknowledgments and declarations stated in the conversations in reference to the claim of the bank upon him as indorser of the note.' Which the court refused. And the plaintiffs then prayed the court to instruct the jury as follows : ' That, if the jury believe, from the evidence aforesaid, that the defendant, after knowing of his discharge from liability as indorser of the said note, by the neglect to demand and give notice, said " that he meant to pay the note, but should take his own time for it, and would not put himself in the power of the bank " ; and that the bank forbore bringing suit, from the time of said conversation, about three or four months after the note fell due, until the date of the writ issued in this cause, then the plaintiffs are entitled to recover on the second count of the declaration.' Which, also, the court refused to give. . . . The question is, whether these instructions, thus propounded, were rightly refused by the court. And we are of opinion that they were. The first requests the court to instruct the jury upon a mere matter of fact, deducible from the evidence, and which it was the proper province of the jury to decide. It asks the court to declare that the conversations stated, sufficiently loose and indeterminate in themselves, amounted to a waiver of the objection of the want of demand and notice. Whether these did amount to such a waiver was not matter of law, but of fact ; and the sufficiency of the proof for this purpose was for the consideration of the jury. The second instruction is open to the same objection. It calls upon the court to decide upon the sufficiency of the proof ; to establish that there was a forbearance by the plaintiffs to sue the defendant upon the note, and of the promise of the defendant, in consideration of the forbearance, to pay the same. That was the very matter upon which the jury were to respond, as matter of fact. It is also open to the additional objection, that it asks the court to decide this point, not upon the whole evidence, but upon a single sentence of the conversations stated, without the slightest reference to the manner in which the meaning and effect of that sentence was, or might be, controlled by the other points of the conversations, or the attendant circumstances. In either view, it was properly refused." So *Carmichael v. Bank of Pennsylvania*, 4 How. Miss. 567, where the court refused to charge, that the declarations of the defendant, a second indorser, that the first indorser " considered that they were exonerated, that he himself thought differently, there was no use in resisting, that the bills must be provided for, and that the first indorser stood between him and danger, were not an absolute promise, and did not amount to a waiver in law." Held, that the refusal was correct. *Lary v. Young*, 8 Eng. Ark. 401. See *Curtiss v. Martin*, 20 Ill. 557 ; *Whitaker v. Morris*, Esp. N. P. 58.

of waiver are matters of law.(e) We should say that the question, whether a promise was really made, and what it is, taken in connection with all the facts of the case, was a matter of fact, as well as whether the promise was made with a knowledge of all the material facts. But what construction is to be put upon the promise and the knowledge, when proved, must be a question of law.

### 3. *Where the Waiver occurs on the Day of Maturity.*

It will be seen that the general principle upon which most of these cases on the subject of waiver before maturity depend is, that the indorser has, by act or word, done something calculated to mislead the holder, and induce him to forego taking the usual steps to charge the indorser. The same principle would apply, in our opinion, when the declarations are made on the day of maturity. Thus, where the holder asked the indorser, on the day the note matured, if it would be best to call upon the makers, and the indorser replied that it would be of no use, a regular demand and notice were considered as waived.(f) So a verbal request by the indorser to the holder not to protest the note was held to be a waiver of demand.(g)

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(e) In *Creamer v. Perry*, 17 Pick. 332, *Shaw*, C. J. said: "Though questions of due diligence and of waiver were originally questions of fact, yet having been reduced to a good degree of certainty by mercantile usage, and a long course of judicial decisions, they assume the character of questions of law; and it is highly important that they should be so deemed and applied, in order that rules affecting so extensive and important a department in the transactions of a mercantile community may be certain, practical, and uniform, as well as reasonable, equitable, and intelligible."

(f) See *Barker v. Parker*, 6 Pick. 80. There were other circumstances in the case, but the court seems to have considered the conversation enough to amount to a waiver. In *Burgh v. Legge*, 5 M. & W. 418, an action against the indorser of two bills due on April 4th and 5th, the defendant called on the plaintiff on April 4th, and said that one of the bills would not be paid, as the acceptor was bankrupt; that the other bill would not be paid, as he held some pictures as security, and had not been able to sell them; and that the acceptor had no other means of raising the money. He also said that it was not worth while to trouble him with a twopenny-post letter, to give notice, as it was not worth the money, and that he would bring the plaintiff some money the next week, in part payment of the bills. Held no evidence to support an allegation of due notice, but that it probably would support an allegation of dispensation of notice.

(g) *Scott v. Greer*, 10 Penn. State, 103. But in *Prideaux v. Collier*, 2 Stark. 57, the drawee told the holder the day before maturity that he had no effects of the drawer in his hands, but would probably be supplied before the next day. On maturity the drawer told the holder that he hoped the bill would be paid; that he would see what he could do; would endeavor to provide effects; and would see him again. The bill was



With reference to the question whether a particular conversation amounts to a waiver, no general rule can be laid down, except that the words used must be such as fairly to lead a reasonable man to suppose that the indorser did not wish that the regular course in making a demand and giving notice should be pursued; or such as would be calculated to prevent him from so doing. But, on the other hand, the language must not be so vague, uncertain, and loose as to raise a reasonable doubt as to what was intended.<sup>(h)</sup> It will be seen that there is a marked

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presented the day after maturity, and the drawer was discharged. Lord *Ellenborough* said: "The evidence shows that it was not likely that the drawees would accept the bill, but it was possible that they might change their minds." It would seem somewhat difficult to reconcile this case with that cited *supra*, p. 589, note r, and there is certainly ground to contend that there was evidence from which a jury might infer a waiver, on the ground that the drawer had, to use the language of the same judge in that case, "taken upon himself the onus of making inquiry." So in *Cayuga Co. Bank v. Dill*, 5 Hill, 404, the indorser called at the bank on the day of maturity, and after observing that the note had come round, asked if it could not be renewed on payment of \$100, and discount. He said that the maker was absent, and that the note would have to lie over until his return. The cashier expressed a willingness to renew the note upon the terms proposed, if the defendant could do no better. On leaving the bank, the defendant told one of the directors the conversation with the cashier, adding that the \$100 dollars should be paid and the note renewed on the maker's return. The director assented to the renewal, and told the cashier to let the note lie. By mistake of one of the clerks, the note was not protested until three days afterwards. On the day of protest the indorser called at the bank and inquired why the note had not been protested. He was told that it would be protested in the afternoon, whereupon he replied that it was too late, and refused to indorse a new note. No notice was sent. The judge at Nisi Prius refused to nonsuit the plaintiff, at the defendant's request, and charged that, under the circumstances, the plaintiff was entitled to a verdict. The verdict was set aside and a new trial granted, *Cowen, J.*, dissenting. *Nelson, C. J.* founded his opinion on the ground that the omission to protest and to give notice arose, not from the conversations, but from the negligence of the clerk; and that the words used were too loose and uncertain to constitute a waiver. *Cowen, J.* was of opinion that the conversation was fully sufficient to amount to a waiver, that it was unreasonable for the defendant, under the circumstances, to object to want of demand and notice. As to the conversation, the opinion of *Cowen, J.* is clearly the better. And as to the effect of the want of protest being caused by the clerk's negligence, it may be observed, that this appears contrary to the case of *Boyd v. Cleveland*, 4 Pick. 525, *supra*, p. 585, note j, where notice was held waived, although the holder made an unsuccessful attempt to notify the indorser. It may also be answered, that the question is not whether the holder was actually misled, but whether, under the circumstances, a reasonably prudent man might not consider that the indorser had waived the necessity of notice. So also if no protest at all had been made, or no attempt to protest, the indorser would probably have been held. It might be difficult, then, to see why an attempt to do that which a party was not bound to do should deprive him of a right to which he would be entitled in case no such attempt had been made.

(h) See *Cayuga Co. Bank v. Dill*, 5 Hill, 404; *Prideaux v. Collier*, 2 Stark. 57. In Vol. I.—2 N 50 \*



difference between the waiver before and after maturity, as regards the question what words will amount to a waiver, for the obvious reason that, in the former case, the holder may be misled, and prevented from presenting and giving notice, while, in the latter, no such circumstance can occur.(i)

#### 4. *Where the Waiver occurs after Maturity.*

The expression, "waiver of demand and notice after maturity," though often used, is somewhat inaccurate. Properly speaking, demand and notice can only be waived before maturity; but the party may, by words or acts subsequent to that time, relieve the plaintiff from the necessity of proving demand and notice, or render the fact that no demand was made or notice given entirely immaterial.(j) The subject of taking security before maturity, with reference to the bearing upon waiver, has already been discussed,(k) and it has been seen that the authorities are somewhat in conflict. But it seems to be well

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*Gregory v. Allen*, Mart. & Y. 74, the note was indorsed when overdue. By agreement between the indorser and indorsee, the latter was not to make any demand until the following May, when the maker was expected to return. The latter returned in July, after the commencement of the suit. No demand or notice was proved. A witness testified, that, a few weeks before the suit, he was present at a conversation between the plaintiff and defendant; that he told them that he expected to go to the place where the maker then was in about a week. They agreed to send the note by him for collection. Plaintiff then asked the defendant if he would be accountable for the amount of the note if he, the plaintiff, would wait until the witness returned. The defendant replied, that he felt himself bound for the note as they had agreed. The understanding of the witness was, that, if he carried the note and failed to get the money, the defendant was to be accountable for it, not otherwise. The witness did not take the trip, and the note was never sent, so far as he knew. A verdict for the plaintiff was set aside, as against evidence, or unsupported by any. *Crabb*, J. said: "The well-settled rule of law is, that, to show a waiver of demand and notice, there must be clear and unequivocal evidence." That is perhaps stating the rule too strictly, as regards a waiver before maturity. An agreement by the drawer and indorser of a bill with the holder, before the bill became due, that the holder should take any security, or make any arrangement he thought proper to secure payment, without affecting their liabilities, does not dispense with the necessity of demand and notice. *Bank v. Spell*, 2 Hill, S. Car. 366.

(i) Story on Prom. Notes, § 280; *Scott*, J., *Lary v. Young*, 8 Eng. Ark. 401.

(j) In *Hoadley v. Bliss*, 9 Ga. 303, *Nisbet*, J. said: "The presiding judge held that the indorser could waive demand and notice before the note fell due, and it is excepted that this was an error. He could waive demand and notice at no other time. It is true that he may, after it is due, waive his right to except to his liability, that is, waive proof of demand and notice, and the presiding judge held nothing to the contrary of this."

(k) *Supra*, pp. 576 - 592.

settled, that taking security after maturity is no waiver, because the reasons for considering security as a waiver do not apply.<sup>(l)</sup>

Although there is great fluctuation and uncertainty in the cases connected with this subject, yet the general principle seems now to be settled, in this country, at least, and by the earlier decisions in England, that, where no demand has been made or notice given, a promise to pay, after maturity, made with full knowledge of laches, is binding on the party promising; and removes entirely the effect of any negligence in making the demand or in giving the notice.<sup>(m)</sup> The cases, however, are

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(l) *Tower v. Durell*, 9 Mass. 332, where the indorser had taken an assignment from the maker, after maturity, of a suit then pending, and had also received part of the rent of a house. Held no waiver of demand. *Creamer v. Perry*, 17 Pick. 332. In this case, demand on the maker was made the day after maturity, and the indorser was notified a few days after. There were two assignments, one before and the other after maturity. The case does not disclose what the terms of the second assignment were. *Shaw*, C. J. said: "The second assignment does not affect the question; it does not appear to have been made till several days after the note became due." *Otsego Co. Bank v. Warren*, 18 Barb. 290. In this case, the plaintiff offered to prove that the defendant, the second indorser of a bill, took an assignment from the first indorser to secure the former for all his liabilities for the drawers, and that the property assigned was sufficient to cover the whole liability, including the draft in suit. Held, that the evidence was properly excluded. *Bacon*, J. said: "If there has been no due presentment or notice of dishonor, and the indorser, *after the maturity* of the note, even supposing himself liable to pay the same, takes security from the maker, that will not amount to a waiver of the objection of want of due presentment or notice; since it cannot justly be inferred that he intends at all events to make himself liable for the payment of the note, but he takes the security merely contingently, in case of his ultimate liability." See *Burrows v. Hannegan*, 1 McLean, 309; *Richter v. Selin*, 8 S. & R. 425, 439. An agreement subsequent to maturity, to put into the hands of the holder certain merchandise, is no waiver. *Carter v. Burley*, 9 N. H. 558. But it was held equivalent to a promise to pay, and as the indorser must have known whether he had received notice or not, such an agreement was held sufficient evidence of waiver in *Debuys v. Molere*, 15 Mart. La. 318.

(m) *Sigerson v. Mathews*, 20 How. 496, where the judge, at *Nisi Prius*, charged the jury, that if, "after the maturity of the note, the defendant promised the plaintiff or his agent to pay the same, having at the time of making said promise knowledge of the fact that the note had not been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the defendant cannot now set up, as a defence to said note, a want of such demand or notice." Held correct. See *Reynolds v. Douglass*, 12 Pet. 497, 505; *Thornton v. Wynn*, 12 Wheat. 183; *Read v. Wilkinson*, 2 Wash. C. C. 514; *Martin v. Winslow*, 2 Mason, 241; *Creamer v. Perry*, 17 Pick. 332; *Hopkins v. Liswell*, 12 Mass. 52; *Byram v. Hunter*, 36 Maine, 217; *Hunt v. Wadleigh*, 26 id. 271; *Davis v. Gowen*, 17 id. 387; *Cram v. Sherburne*, 14 id. 48; *Groton v. Dallheim*, 6 Greenl. 476; *Edwards v. Tandy*, 36 N. H. 540; *Rogers v. Hackett*, 1 Foster, 100; *Parker, C. J., Merrimack Co. Bank v. Brown*, 12 N. H. 320, 325; *Woodman v. Eastman*, 10 id. 359; *Whitney v. Abbot*, 5 id. 378; *Otis v.*

somewhat strict in their requirements, as they should be. In the first place, there should be clear and distinct evidence of the promise.<sup>(n)</sup> The following are instances in which it was held that the promise was sufficiently made out. Where the indorser of a note said to the plaintiff's agent, on being asked what to do, that in a few days he would see the agent and arrange the note; <sup>(o)</sup> a declaration by the indorser, that when he returned he would set matters to rights; <sup>(p)</sup> an acknowledgment of the debt by the drawer, with a promise to send funds with which to take

Hussey, 3 id. 346; *Hosmer*, C. J., *Breed v. Hillhouse*, 7 Conn. 523, 528; *Brooklyn Bank v. Waring*, 2 Sandf. Ch. 1; *Bruce v. Lytle*, 13 Barb. 163; *Tebbetts v. Dowd*, 23 Wend. 379; *Leonard v. Gary*, 10 id. 504; *Jones v. Savage*, 6 id. 658; *Trimble v. Thorne*, 16 Johns. 152; *Griffin v. Goff*, 12 Johns. 423; *Miller v. Hackley*, 5 id. 375; *Duryee v. Dennison*, id. 248; *Strong, J.*, *Sherer v. Easton Bank*, 33 Penn State, 134, 141; *Donaldson v. Means*, 4 Dall. 109; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *U. S. Bank v. Southard*, id. 473; *Barkalow v. Johnson*, 1 id. 397; *Beck v. Thompson*, 4 Harris & J. 531; *Higgins v. Morrison*, 4 Dana, 100; *Pate v. M'Clure*, 4 Rand Va. 164; *Walker v. Laverty*, 6 Munf. 487; *Moore v. Tucker*, 3 Ired. 347; *Gardiner v. Jones*, 2 Murph. 429; *Johnson, J.*, *Allwood v. Haseldon*, 2 Bailey, 457; *Hall v. Freeman*, 2 Nott & McC. 479; *Spurlock v. Union Bank*, 4 Humph. 336; *Durham v. Price*, 5 Yerg. 300; *Sherrod v. Rhodes*, 5 Ala. 683; *Kennon v. M'Rea*, 7 Port. Ala. 175, where it was held that the promise might be made after suit brought; *Harvey v. Troupe*, 23 Missis. 538; *Oglesby v. Steamboat*, 10 La. Ann. 117, where the promise was made after the commencement of the suit; *New Orleans Bank v. Harper*, 12 Rob. La. 231; *Lacoste v. Harper*, 3 La. Ann. 385; *Glenn v. Thistle*, 1 Rob. La. 572; *Hart v. Long*, id. 83, where the plaintiff had been nonsuited for want of proof of demand at the place where the note was payable, and the indorser promised to pay while a motion for a new trial was pending, the plaintiff's attorney having explained to him the reason of the nonsuit; *Union Bank v. Grimshaw*, 15 La. 321; *Bank of U. S. v. Ellis*, 13 id. 368; *Williams v. Robinson*, id. 419; *Debuys v. Mollere*, 15 Mart. La. 318; *Walker v. Walker*, 2 Eng. Ark. 542; *Dorsey v. Watson*, 14 Misso 59; *Wilson v. Huston*, 13 id. 146; *Pratte v. Hanly*, 1 id. 35; *Whitaker v. Morrison*, 1 Fla. 25; *Sharkey, C. J.*, *Robbins v. Pinckard*, 5 Smedes & M. 51, 70. The following English cases are authorities to the same point. *Whitaker v. Morris*, Esp. N. P. 58; *Anson v. Bailey*, Bull. N. P. 276; *Wilkes v. Jacks*, Peake, 202; *Rogers v. Stevens*, 2 T. R. 713; *Hopes v. Alder*, 6 East, 16, note; *Lundie v. Robertson*, 7 East, 231, 3 J. P. Smith, 225; *Haddock v. Bury*, 7 East, 236, note; *Stevens v. Lynch*, 12 id. 38, 2 Camp. 332; *Bayley, J.*, *Brett v. Levett*, 13 East, 213; *Potter v. Rayworth*, id. 417; *Hopley v. Dufresne*, 15 East, 275; *Taylor v. Jones*, 2 Camp. 105; *Patterson v. Becher*, 6 J. B. Moore, 319; *Vaughan, B.*, *Pickin v. Graham*, 1 Crompt. & M. 725, 729; *Fletcher v. Froggatt*, 2 Car. & P. 569; *Houlditch v. Cauty*, 4 Bing. N. C. 411; *Mills v. Gibson*, 16 Law J., C. P. 249.

<sup>(n)</sup> *Mansfield, C. J.*, *Borradaile v. Lowe*, 4 Taunt. 93; *Vaughan, B.*, *Pickin v. Graham*, 1 Crompt. & M. 725, 728; *Spencer, J.*, *Griffin v. Goff*, 12 Johns. 423; *Duncan, J.*, *Richter v. Selin*, 8 S. & R. 425, 438. See *Whitaker v. Morrison*, 1 Fla. 25.

<sup>(o)</sup> *Sigerson v. Mathews*, 20 How. 496. *McLean, J.* said: "This was an unconditional promise to pay the note, which no one could misunderstand, and which the defendant could not repudiate at any subsequent period."

<sup>(p)</sup> *Anson v. Bailey*, Bull. N. P. 276.

up the bill ; (q) a request by the indorser, when called on for payment, for delay, with a promise to pay in a few days ; (r) a promise to the holder, that the drawer would arrange with the drawee, so that the draft should be paid ; (s) a promise by the drawer, that he would see the bill paid ; (t) a request by the indorser to the holder to sue the maker, with a promise to pay, if the note could not be collected of the latter ; (u) a promise by the indorser to pay the note as soon as he could, with a statement that he doubted whether he should be able to do it under eight months, but that he should have the amount by that time ; (v) an agreement of the indorser of a note to consider the demand as made in due time, and himself liable as indorser ; (w) a promise to pay when it should be in the defendant's power ; (x) when the indorser wished for time, and agreed to give security on the plaintiff's request therefor, and a subsequent refusal to comply with the agreement ; (y) a promise to pay a part, (z) unless the drawer expressly limit his liability to the payment of that part only ; (a) an admission by the drawer, after suit was

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(q) *Read v. Wilkinson*, 2 Wash. C. C. 514.

(r) *Hopkins v. Liswell*, 12 Mass. 52. But in *Freeman v. Boynton*, 17 id. 483, where the indorser complained of the hardship of his case, but promised to pay as soon as he possibly could, or words to that effect, *Parker, J.* said, that "the facts reported do not show any direct promise to pay"

(s) *Byram v. Hunter*, 36 Maine, 207.

(t) *Hopes v. Alder*, 6 East, 16, note.

(u) *Lane v. Steward*, 20 Maine, 98.

(v) *Rogers v. Hackett*, 1 Foster, 100.

(w) *Duryee v. Dennison*, 5 Johns. 248.

(x) *Donaldson v. Means*, 4 Dall. 109.

(y) *Beck v. Thompson*, 4 Harris & J. 531.

(z) *Harvey v. Troupe*, 23 Missis. 538, where the judge, at *Nisi Prius*, charged the jury that "A promise by a drawer of a bill of exchange, after its maturity, to pay the same, or any part thereof, is a waiver by him of presentment to the acceptor, of demand of payment, and notice of protest." Held correct. *Smith, C. J.* said : "A promise to pay generally, or a promise to pay a part, or a part payment made, with a full knowledge that he has been released from liability on the bill by the neglect of the holder, will operate as a waiver, and bind the party who makes it for the payment of the whole bill." In *Margetson v. Aitken*, 3 Car. & P. 338, there was no proof of any notice of dishonor, but after the bill had become due, the indorser offered to pay the plaintiff a composition of eight shillings in the pound. Lord *Tenterden* expressed an opinion that this dispensed with the necessity of notice.

(a) *Harvey v. Troupe*, 23 Missis. 538, where the bill was for \$ 1,309.25. The drawer paid \$ 250, promised to pay \$ 900 more, but claimed a credit for some cotton shipped by him to the acceptors. *Fletcher v. Froggatt*, 2 Car. & P. 569, where the drawer of a bill for £ 200, not having received due notice of its dishonor, stated to a witness that

commenced, of the justice of the plaintiff's claim; (b) a statement by the indorser, during the pendency of the suit, that the maker had promised to make some arrangement, and that he, the indorser, would pay in the course of a few months; (c) an acknowledgment of the debt by the drawer, with a promise to pay by instalments, on short time. (d) The question, what influence the usage of banks may have upon the matter of waiver of demand, has already been considered, (e) as well as the indorsement of a joint note where the makers live so far apart that a demand on all on the same day is impossible; (f) or where the indorsement is made so soon before maturity as to render a demand on the very day of maturity impossible. (g) In the following instances the promises have been held not to be sufficiently clear and distinct to show a waiver. A reply by the indorser, upon being asked what would be done with the note, that it will be paid; (h) a reply by an indorser, to the question whether he had any defence, that he knew of no defence; (i) a remark of an indorser to a third party, speaking of several bills, that he would take care of them, or see them paid, it not being certain whether the bill in suit was referred to or not; (j) a

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he did not mean to insist upon want of notice, but was only bound to pay £70. Held, that the plaintiff could only recover £70.

(b) *Oglesby v. Steamboat*, 10 La. Ann. 117.

(c) *Hart v. Long*, 1 Rob. La. 83.

(d) See *Union Bank v. Grimshaw*, 15 La. 321.

(e) *Supra*, chapter on Demand.

(f) *Supra*, p. 457, note v.

(g) *Supra*, p. 456, note t.

(h) *Creamer v. Perry*, 17 Pick. 332. *Shaw, C. J.* said: "It is a rule of law, that if an indorser, knowing that there has been no demand and notice, and conversant with all the circumstances, will promise to pay the note, this is to be deemed a waiver. But these rules in regard to notice and waiver are to be held with some strictness, in order to insure uniformity of practice and regularity in their application. . . . In the present case, we are of opinion that the evidence falls short of proving a *promise* by the defendant, either to pay the note or see it paid. . . . The strongest expression used by the defendant in the course of a long conversation was, the note will be paid. This is quite as consistent with the hypothesis that it was a mere assertion of his expectation that it would be paid by the promisor, as of a promise on his own part to pay it; and from the general tenor of his conversation, we think it cannot be inferred that it was his intention, knowing of his discharge, to waive his defence, and promise to pay the note, or see it paid at all events." *Contra*, *Rogers v. Stevens*, 2 T. R. 713, where the drawer said to the plaintiff's agent, on being informed that the bill had been dishonored, "It must be paid." Lord *Kenyon* directed a verdict for the plaintiff, which was sustained.

(i) *Griffin v. Goff*, 12 Johns. 423.

(j) *Miller v. Hackley*, 5 Johns. 375, *Anthon*, 91. *Van Ness, J.* said, as reported ■

statement by the drawer, on being urged by the agent of the holder to give a good bill for the amount of the first bill, which the agent said was unfair, that it would afford him great pleasure to do so, but that he thought it improper; (*k*) an answer by the indorser of a bill, in reply to a demand, stating that he could not think of remitting till he received the draft, and requesting the holder to return it to the prior indorser, if he thought him, the defendant, unsafe; (*l*) when the drawer said, I am unacquainted with your laws; if I am bound to pay the bill, I will; (*m*) when the indorser said to the bailiff, who had arrested him for the debt, that it was true the note had his name on it, but he had security, though he wished for time to pay it. (*n*)

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Johnson: "I think there was not the requisite evidence of such promise. It ought to have been made out clearly and unequivocally. The defendant only said to a third person, when talking generally of all the bills, . . . that he would take care of the bills, or see them paid. Whether he used the one phrase or the other is left in doubt; and if the first phrase was used, it was altogether uncertain whether he meant to be understood that he would resist or would pay the bills. It would be dangerous to fix an indorser, without notice, and perhaps without knowledge, of the laches of the holder, upon such loose conversation with a third person. No case has ever gone so far."

(*k*) *Sherrod v. Rhodes*, 5 Ala. 683.

(*l*) *Borradaile v. Lowe*, 4 Taunt. 93, where *Munsfield*, C. J. said: "I do not find any case in which an indorser, after having been discharged by the laches of the holder, has been held liable upon his indorsement, except where an express promise to pay the bill has been proved. Now the letter of the defendant contains no such express promise, but in a great measure shows that the defendant was writing under a supposition that he was liable, and that the prior indorsers would pay the bill; for he desires that it may be sent to Trevor & Co., who were the indorsers next in priority; but when he afterwards finds that the case is otherwise, and that the other indorsers would not pay, and that he also was discharged, he refuses, as it was still open to him to do. I cannot consider the letter as conveying an absolute promise to pay at all events, whether Trevor & Co. did or not; and I think, in this case, it would be too much to fix the defendant by any such implied promise. In most of the cases where the defendants have been held liable, they have either made an express promise to pay, or a promise when they had a full knowledge, at the time they were discharged, or where there was a real debt binding in conscience, due from them; but none of the cases have gone to the extent of making the defendant liable; and to hold that he was, in this instance, would be extending them beyond their fair import."

(*m*) *Dennis v. Morrice*, 3 Esp. 158.

(*n*) *Rouse v. Redwood*, 1 Esp. 155, where Lord *Kenyon* said: "When a person is arrested, and at the time ignorant of his rights, or whether he is bound by law to pay the demand or not, and under such circumstances makes any concession, and seemingly admits the demand, such admission shall not be allowed to be given in evidence to charge him." See *Cuming v. French*, 2 Camp. 106, note; *May v. Coffin*, 4 Mass. 341.



It has often been said that the promise must not be conditional; (o) but the authorities in which this doctrine is held decide only that a conditional promise which is unaccepted is not binding. (p) And we think the rule should be so stated, because if the holder agrees to perform the conditions stipulated, and does substantially carry them out, this would seem to show an intent to waive objection to any laches equally with a direct unconditional promise. (q) Thus, an offer by the drawer to pay by instalments, substantially accepted, has been held binding. (r)

The following are instances in which a conditional promise, not accepted, has been held not binding. An offer by the indorser to give his own note, payable in a year, refused by the holder, because he wished an indorser to this note; (s) an offer by an indorser to turn out notes; (t) an offer by an indorser to pay

(o) See *Donaldson v. Means*, 4 Dall. 109; *Dayton, J., Sussex Bank v. Baldwin*, 2 Harrison, 487, 495, 496; *Daniel, J., Moore v. Tucker*, 3 Ired. 347.

(p) In *Crain v. Colwell*, 8 Johns. 384, the court said: "The promise was conditional, and not binding, except upon the terms imposed." In the cases cited *infra*, the offers were rejected. *Sice v. Cunningham*, 1 Cowen, 397. In *Barkalow v. Johnson*, 1 Harrison, 397, 403, *Hornblower*, C. J. said: "The offer made by the defendant not having been accepted, matters remained *in statu quo*, and each party stood upon their legal rights." In *Kennon v. McRea*, 7 Port. Ala. 175, 184, *Collier*, C. J. said: "If conditional, the performance of the condition must be proved, before the promise or acknowledgment becomes absolute." See *Cuning v. French*, 2 Camp. 106, note.

(q) Thus it will be seen in the cases cited *supra*, that the promises were held binding, although conditional. But the conditions were accepted.

(r) See *Union Bank v. Grimshaw*, 15 La. 321, 339, where *Morphy, J.* said: "In defendant's first letter to the plaintiff, after fully acknowledging his obligation to pay his bills, he proposes to renew them at four, six, eight, and ten months' sight, with interest, under the most solemn assurances of payment. Nine months after, he writes two other letters in the same sense, asking the plaintiffs' indulgence on paying part, and offering additional security. It is objected, that these propositions of defendant were rejected, and that his promises to pay were conditional. . . . The defendant's propositions, it is true, were not formally accepted, but in consequence of his unqualified acknowledgment of the debt, and positive assurances of payment, the plaintiff forbore to bring suit until the 22d of February, 1838; thus granting him a delay of nine months, a greater or more advantageous indulgence than he had asked. It does not appear to us that there is any condition in the defendant's letters; there is *term of payment*, but not a *condition*. They are two things very distinct; the former necessarily presupposing a debt, and the latter not. 'A *term*,' says Pothier, No. 230 on Obligations, 'differs from a condition, inasmuch as a condition suspends the *engagement formed by the agreement*; whereas a *term* does not suspend the engagement, but merely postpones the execution of it.' . . . Defendant's acknowledgment of the debt, and his promise to pay it, must then be viewed either as an admission that the notices were good, or as a waiver of them."

(s) *Agan v. M'Manns*, 11 Johns. 180.

(t) *Crain v. Colwell*, 8 Johns. 384.



part in cash, and to give his note for the balance ; (*u*) an offer by the indorser to give a new note of the same maker, indorsed by him, refused by the holder, who asked the indorser's own note ; (*v*) an offer by an indorser to give his own note. (*w*)

It seems to be well settled, that a mere promise to pay, although direct and unqualified, will not be sufficient to constitute a waiver, where it appears that demand was not made nor notice given, or where there was actual laches in the acts themselves. The plaintiff in each case must go further, and prove knowledge, on the part of the party promising, of the facts. (*x*)

(*u*) *Barkalow v. Johnson*, 1 Harrison, 397.

(*v*) *Laporte v. Landry*, 17 Mart. La. 359, 16 id. 125.

(*w*) *Sice v. Cunningham*, 1 Cowen, 397.

(*x*) *Kelley v. Brown*, 5 Gray, 108 ; *Low v. Howard*, 10 Cush. 159 ; *Hopkins v. Liswell*, 12 Mass. 52. See *Freeman v. Boynton*, 7 id. 483 ; *Hunt v. Wadleigh*, 26 Maine. 271 ; *Davis v. Gowen*, 17 id. 387 ; *Groton v. Dallheim*, 6 Greenl. 476 ; *Edwards v. Tandy*, 36 N. H. 540 ; *Woodman v. Eastman*, 10 id. 359 ; *Carter v. Burley*, 9 id. 558, 572 ; *Farrington v. Brown*, 7 id. 271, where an indorser signed an instrument stating that he held himself accountable. Held not binding, because not proved to have been made with knowledge of laches. *Otis v. Hussey*, 3 id. 346 ; *Jones v. Savage*, 6 Wend. 658 ; *Sice v. Cunningham*, 1 Cowen, 397 ; *Trimble v. Thorne*, 16 Johns. 152 ; *Beckman v. Connelly*, cited 16 id. 154 ; *Crain v. Colwell*, 8 id. 384 ; *Sussex Bank v. Baldwin*, 2 Harrison, 487 ; *U. S. Bank v. Southard*, id. 473 ; *Barkalow v. Johnson*, 1 id. 397 ; *Philips v. M'Curdy*, 1 Harris & J. 187 ; *Patton v. Wilmot*, id. 477 ; *Bank of U. S. v. Leathers*, 10 B. Mon. 64, 66 ; *Moore v. Coffield*, 1 Dev. 247 ; *Fotheringham v. Price*, 1 Bay, 291 ; *Spurlock v. Union Bank*, 4 Humph. 336 ; *Brown v. Lusk*, 4 Yerg. 210 ; *New Orleans Bank v. Harper*, 12 Rob. La. 231 ; *Lacoste v. Harper*, 3 La. Ann. 385 ; *Glenn v. Thistle*, 1 Rob. La. 572 ; *Harris v. Allnutt*, 12 La. 465 ; *Tickner v. Roberts*, 11 id. 14. But in *Walker v. Laverty*, 6 Munf. 487, the drawer acknowledged that the debt was a just one, and said that he would pay it. The defendant's counsel asked the court to charge the jury, that, unless the acknowledgment was made with a knowledge of the facts, it was not to be received. But the court instructed the jury, that the acknowledgment was a waiver of all notes. A judgment for the plaintiff was affirmed. The reasons for the opinion of the court are not stated. It may be, however, that, inasmuch as it was a question of waiver of notice, they proceeded upon the ground that the defendant must have known whether he had received notice or not. This case is recognized in *Pate v. M'Clure*, 4 Rand. Va. 164 ; *Blesard v. Hirst*, 5 Burr. 2670. See *Goodall v. Dolley*, 1 T. R. 712. In *Hopley v. Dufresne*, 15 East, 275, the plaintiff had been nonsuited because the presentment had been made after banking hours, although there was evidence that, after the declaration had been filed, the defendant had applied for an extension of time within which to pay the bill. It did not expressly appear whether the defendant knew, at the time, of the defect in the presentment. "Lord *Ellenborough*, stopping the argument, said that the court thought that it should have been left to the jury to say whether, under the circumstances of the case, the defendant had notice, at the time of his application for indulgence, that there had been no due presentation, and therefore made the rule absolute" for a new trial. In *Pickin v. Graham*, 1 Crompt. & M. 725, the clerk of the defendant, a drawer,

It has been sometimes said that a waiver cannot be inferred.<sup>(y)</sup> But if by this is meant that direct knowledge must be proved, we think it incorrect. Indeed, there does not appear to be any good reason why knowledge may not be proved in the same manner and by the same evidence in this matter as in any other. A jury will be justified in inferring knowledge from a variety of circumstances, such as the situation and connection of the parties, the words and acts of the indorser, the time which has elapsed between the maturity of the note or bill and the promise, and the like.<sup>(z)</sup> It would seem that, where the question

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called upon an indorser the day after maturity; but before it could be known that the bill had been dishonored, and after it had been intimated that the acceptor would not or could not probably pay, the clerk said: "If that be so, I suppose there is no alternative but for me to pay the bill; if you will bring it to Sheffield next Tuesday, I will pay it." Held not binding, the defendant having received no notice till several days after maturity. The rule, as stated in the text, however, is inconsistent with the language used in some of the cases, where it is stated that a promise to pay will dispense with proof of presentment and notice, and throw on the defendant the double burden of proving laches and ignorance. This point is treated *infra*, p. 624. So in *Schmidt v. Radcliffe*, 4 Strob. 296, where the indorser promised to pay eight months after maturity, the maker and indorser residing in the same place, and having frequent business transactions with each other, the court seem to have considered the promise sufficient.

(y) See *Laporte v. Landry*, 16 Mart. La. 125, 17 id. 359.

(z) In *Martin v. Winslow*, 2 Mason, 241, where there had been a delay of seven months to demand payment of the note which was payable on demand, which is an unreasonable delay under ordinary circumstances, *Story, J.* charged the jury as follows: "A promise to pay, with a full knowledge of all the facts, is binding upon the indorser, although he might otherwise be discharged. But if he promise in ignorance of material facts affecting his rights, it is not a waiver of those rights. The question, then, is, whether the indorser in this case had such knowledge. It may be inferred from the connection between the parties, their near relationship, and the deep interest which the defendant had in this particular case to ascertain, after the death of the maker, his own responsibility as indorser. It may also be inferred from the language used by him on this occasion. He did not object to the delay, though he knew the length of time which had elapsed since the note was given. As no objection of this sort was made, it leads to the presumption, either that the indorser understood originally that the note was to lie unpaid for a period at least as long, or that, under all the circumstances, he did not deem it an unreasonable delay. He had no ground to presume that any demand of payment was made of the maker in his lifetime, and the fact that the first known demand was on the administrators, and the first notice given to him after that demand, would strongly lead him to the conclusion that there had been no prior demand. And in fact no prior demand was made. But as these are mere presumptions of fact arising from the circumstances, the jury will give them what weight they think them entitled to." See the remarks of *Eustis, J.*, cited *infra*, p. 608, note *p*, where an indorser of a bill, after having had sufficient opportunity to ascertain the circumstances of the presentment, protest, and notice, promised a subsequent indorser who had taken up the bill to repay him, afterwards received the bill from this indorser, proved it in his own

was one of waiver of notice alone, an unequivocal promise on the part of the indorser or drawer would ordinarily be, at least, *prima facie* sufficient; because the party must know whether he had received notice or not; and a promise to pay when no notice at all has been given, would seem to show an intent to waive objection to liability on this account. There are authorities in which this view seems to be adopted,<sup>(a)</sup> but it is inconsistent with oth-

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name against the estate of the drawer who had failed, received a dividend upon it, and returned the bill. Held that he was liable on this promise, unless he could prove it to have been made under a mistake of the facts. *Martin v. Ingersoll*, 8 Pick. 1. In *Hopley v. Dufresne*, 15 East, 275, the facts in which are cited *supra*, p. 601, note *x*, the grounds on which it was contended that the indorser knew that the presentment had been defective appear to have been, that the defendant, an indorser of a bill, applied for an extension after the declaration had been filed, which alleged due presentment. Lord Ellenborough appears to have considered these circumstances so far sufficient as to authorize the question of knowledge to be submitted to the jury. In *Patterson v. Becher*, 6 J. B. Moore, 319, the defendant, a drawer of a bill, appears to have made a promise to the plaintiff's attorney; and subsequently, on the same day, the defendant's attorney wrote a letter to the attorney of the plaintiff, stating that he had waited on the defendant and advised with him respecting the demand; and that, in behalf of the defendant, he offered to give a warrant of attorney for the amount, payable in three months, the earliest period that he could, with any degree of certainty, fix for the payment of the same. Although the facts do not show whether there was any presentment or protest, yet the court seem to have decided the case upon the ground that the above facts constituted a waiver of presentment, and not merely presumptive evidence. See *Schmidt v. Radcliffe*, 4 Strob. 296.

(a) See the remarks of *Washington*, J. cited *infra*, p. 605, note *g*. See *Walker v. Laverty*, 6 Munf. 487, *supra*, p. 601, note *x*; *Pate v. M'Clure*, 4 Rand. Va 164; *Rogers v. Hackett*, 1 Foster, 100, *infra*, p. 605, note *e*; *Wilkes v. Jacks*, Peake, 202; *Nash v. Harrington*, 1 Aikens, 39, 2 id. 9; *Ladd v. Kenney*, 2 N. H. 340, where the presentment was in due season. *Richardson*, C. J. said: "In the present case, the defendant, when informed, more than four weeks after the note became due, that it had not been paid, made no objection that he had not been seasonably notified, but promised to see the maker, and have the note paid before he returned home. We are of opinion that the jury were rightly directed to consider such a promise as a waiver of any objection to the notice, and that there must be a judgment on the verdict. See the remarks of *Weston*, C. J., cited *infra*, p. 604, note *d*; of *Shaw*, C. J., *infra*, p. 606, note *k*. In the facts as reported there does not appear to have been any evidence of actual knowledge that no notice had been given. In *Fitch v. Redding*, 4 Sandf. 130, where the defence was want of proof of notice, the drawer of the check apologized for its not being paid, and gave as a reason, that it was not convenient at the time, but promised to pay it in a few days. *Duer*, J. said: "As the defendant had no funds in the bank upon which the check was drawn, he was not entitled to notice; and had he been notified, his subsequent promise to pay the check would have been a waiver of the defence." There does not appear to have been any evidence of knowledge of want of notice. In *Barkalow v. Johnson*, 1 Harrison, 397, 402, *Hornblower*, C. J., after referring to the absence of facts showing knowledge, said that the indorser "knew indeed whether he had or had not received a notice of demand and non-pay

ers.(b) In the following instances, the finding of the jury, that the defendant had knowledge of the facts, was held to be justified; where the agent of the plaintiff called on the defendant, and informed him that he had neglected to take measures for the collection of the note, and asked him what he should do; (c) where the drawer of a draft, on being informed of its non-payment, took the draft to obtain payment, and afterwards returned it, saying that he was unable to procure payment; (d)

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ment." In *Debuys v. Mollere*, 15 Mart. La. 318, *Mathews*, J. said: "This agreement is equivalent to a promise to pay, and it only remains to ascertain the legal effect of the promise. The indorser must have known whether he was duly notified of the protest. If he were not, by promising to pay he waived the advantage which such negligence would otherwise have given; if he did not receive regular notice, he is liable under his subsequent promise." See *Nash v. Harrington*, 1 Aikens, 39, 2 id. 9; *Loose v. Loose*, 36 Penn. State, 538.

(b) *Trimble v. Thorne*, 16 Johns. 152. *Spencer*, C. J. said: "The court never intended, in the various cases which have come before them on this point, to leave it to be inferred, from the mere fact of the subsequent promise, that regular notice had been given, or was intended to be waived. In the case of *Beekman v. Connelly*, recently before us, we held, that the proof of a promise to pay, merely, without its appearing also that the party knew he had not received regular notice, did not dispense with the proof of regular notice. An indorser may believe that due notice has been given, inasmuch as notices need not be personally served, and under an ignorance of the fact, consider himself liable when he is not. It is no hardship on the holder of a bill or note, to require of him proof of regular notice; but if a party, with a full knowledge of all the facts, voluntarily promises to pay, and waives his right to notice, he will be held to his promise." This case has been overruled by another in the same jurisdiction, and much doubted in others, as will be seen subsequently, but on another point. So *Dayton*, J., in *Sussex Bank v. Baldwin*, 2 Harrison, 487, 496, said, that "an admission that notice of the protest had been received through the bank is nothing. It does not appear when it was received." *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229; *New Orleans Bank v. Harper*, 12 Rob. La. 231; *Lacoste v. Harper*, 3 La. Ann. 385; *Glenn v. Thistle*, 1 Rob. La. 572; *Harris v. Allnutt*, 12 La. 465; *Laporte v. Landry*, 17 Mart. La. 359, 16 id. 125.

(c) *Sigerson v. Mathews*, 20 How. 496.

(d) *Cram v. Sherburne*, 14 Maine, 48. *Weston*, C. J. said: "It is insisted that there is no evidence that the defendant knew that the plaintiff had been guilty of laches, and that therefore the judge was not justified in leaving it to the jury to find such knowledge. We think otherwise. The defendant knew that no notice had been given to him that the note was not paid, until a month after it was drawn, although it was payable in three days. And his conduct is evidence that he knew the order had not been demanded at its maturity, for he himself undertook at that time to make the demand for the plaintiff of the drawer, who declined to pay it. He knew this demand was unreasonable, notwithstanding which he expressly promised the plaintiff to pay him the amount of the order. The demand made by the defendant was either made by him as agent for the plaintiff, the holder, or it is evidence that he undertook to do it himself, waiving his right to require that it should be done by the plaintiff. And in

where the holder testified that the indorser knew, by a conversation held between them, that no demand had been made; (e) an acknowledgment of liability by the first indorser, coupled with an agreement to pay one fourth of the note, subsequent to a suit against him by the holders, and judgment obtained after contestation. (f)

In the following instances, the evidence was held not sufficient to show knowledge. A statement by the indorser that he knew that the maker had not paid, and was not to pay the note; that it was the concern of himself alone, and that the maker had nothing to do with it; (g) knowledge that a note had not been paid, (h) because a knowledge of non-payment is not a knowledge of non-presentment; a statement by an indorser, that he had no depend-

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either case it is evidence, by necessary implication, of a waiver of notice of non-payment from the plaintiff."

(e) *Rogers v. Hackett*, 1 Foster, 100. This was held a waiver of demand and notice; nothing appears to be said as to the knowledge, or want of knowledge, of the notice not being given.

(f) *Keeler v. Bartine*, 12 Wend. 110. In this case judgment had been obtained against the last indorser, and the maker and indorser had agreed that each should pay one fourth of the judgment, and neither party should look to the other for any part so agreed to be paid by him. The second indorser, nevertheless, after payment of his fourth part, sued the first indorser for the amount, and recovered, because there was no consideration for the agreement. It was in this last suit that the defendant was presumed, from the facts, to have had knowledge of laches, and demand and notice, if any existed.

(g) *Thornton v. Wynn*, 12 Wheat. 183, 188. *Washington, J.* said: "These declarations amounted to an unequivocal admission of the original liability of the defendant to pay the note, and nothing more. It does not necessarily admit the right of the holder to resort to him on the note, and that he had received no damage from the want of notice, unless the jury, to whom the conclusion of the fact from the evidence ought to have been submitted, were satisfied that the defendant was also apprised of the laches of the holder, in not making a regular demand of payment of the note, by which he was discharged from his responsibility to pay it. The knowledge of this fact formed an indispensable part of the plaintiff's case, since without it, it cannot fairly be inferred that the defendant intended to admit the right of the plaintiff to resort to him, if, in point of fact, he had been guilty of such laches as would discharge him in point of law. For anything that appeared to the court below, from the evidence stated in the bill of exceptions, the admissions of the defendant may have been made upon the presumption that the holder had done all that the law required of him, in order to charge the indorser. That due notice was not given to the defendant, he could not fail to know; but that a regular demand of the maker of the note could not be inferred by the court from the admissions of the defendant."

(h) *Low v. Howard*, 11 Cush. 268, where a charge to a jury, that a promise to pay, with full knowledge that the note had not been paid nor notice given, was a waiver of demand and notice, was held incorrect.

ence on the maker to pay the note, that he understood that the note was lying over unpaid, and he expected it would have been sent on for collection before ; (i) the fact that the drawer has included the demand in an account for his creditors, in an application for his discharge in insolvency.(j)

Although it is clear that a promise to pay, with knowledge that no demand has been made nor notice given, is sufficient to constitute a waiver ; yet it is still open to the defendant to prove that, although he knew these facts, the promise was made in ignorance of other material circumstances, which, if he had known, would have prevented him from making the promise.(k) Thus, where the holder gave up the indorsed note to another party, receiving his in return, under circumstances showing that the latter note was taken in payment of the former, or under circumstances which would discharge the indorser, and subsequently took back the former, the latter being unpaid, a promise by the indorser to pay, in ignorance of these circumstances, was held not binding.(l)

(i) *U. S. Bank v. Southard*, 2 Harrison, 473. *Nevius, J.* said : " Suppose he did not expect that the maker would pay the note, this would not absolve the holders from their obligation to make the demand ; and suppose it to be true that he was informed that the note was laying over unpaid, this was no evidence to him that it had been duly demanded of the maker ; and his expectation that it would before have been sent on for collection does not prove that he knew that he was discharged by the laches of the holder."

(j) *Jones v. Savage*, 6 Wend. 658.

(k) *Low v. Howard*, 10 Cush. 159. where the judge at Nisi Prius charged the jury that, though it was generally true that a promise by an indorser to pay the note, when there had been no demand, and no notice of its dishonor, would be held to be a waiver thereof, if these facts were known to him ; yet the rule would not apply to a case where other material circumstances existed, the knowledge of which was essential to a full understanding of his rights and obligations. *Shaw, C. J.* said : " We think the directions were right. The legal foundation of the doctrine of waiver is, that a party knowing his rights voluntarily consents to forego them. . . . Knowledge of all the material facts on which those rights depend is essential to a valid waiver. The legal liability of an indorser is conditional on demand and notice. But the condition is one made for his benefit ; and therefore he may waive it. If he is satisfied that demand and notice would be of no benefit to him, it is quite natural that he should waive them. In general, if he knows there has been no demand and notice, and yet promises to pay, it is strong evidence of waiver. But if there be other facts which might tend to influence his judgment, known to the holder, but not to the indorser, then his promise to pay is not conclusive evidence. Here, then, were facts alleged to be material, and if true, were so, and they were left to the jury with proper directions, who found a verdict for the defendant, and therefore affirmed the truth of the facts."

(l) *Low v. Howard*, 10 Cush. 159. The facts in this case were as follows. The holder



It has been held by some authorities, that a promise to pay by the indorser, in ignorance of the fact that the circumstances known to him would discharge him in law, was not binding; or, in other words, that a promise to pay in ignorance of law was of no effect.<sup>(m)</sup> But this has been repudiated,<sup>(n)</sup> and with reason,

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of the first note went to the parties in whose employ the maker was, to endeavor to obtain payment out of what they might be owing the maker. They took this note and gave their own for the same amount, payable at the same time, which the holder received as a receipt for the first. They owed the maker at the time, showed him the note, and with his consent agreed to charge it to him. The makers of the second note became insolvent, and there had been no settlement between them and the maker of the first. The holder then took back from the makers the first note, giving up the second. Before the time of the last transfer, one of the makers, who had obtained possession of the second note, had erased his name therefrom, but put it upon the note again, at the suggestion of the holder, who made a verbal agreement that he should never be called on for payment.

(*m*) *Warder v. Tucker*, 7 Mass. 449, where the court said: "And although the defendant, when he first received notice from the plaintiffs of the protest of the bill, considered himself as liable by law to pay the plaintiffs the amount of it, yet his ignorance of the law shall not bind him to fulfil an engagement made through mistake of the law." In *Freeman v. Boynton*, 7 Mass. 483, *Parker, J.* said: "Nor will any supposed acknowledgment of the indorser, that he was liable to pay the note, avail the plaintiffs in the present case. The facts reported do not show any direct promise to pay, and even if they did, it is well settled that a promise under such circumstances as show an ignorance that the party was legally discharged is without consideration and void." *Fleming v. M'Clure*, 1 Brev. 428. See *Spurlock v. Union Bank*, 4 Humph. 336. In *Miller v. Hackley*, Anthon, 68, *Thompson, J.* said: "That a promise may amount to a waiver in a case like the present, enough must appear to render it justly presumable that the defendant at the time knew the fact of the want of notice, and also knew his legal rights." See *Chatfield v. Paxton*, 2 East, 471, note *a*.

(*n*) *Ladd v. Kenney*, 2 N. H. 340. *Cowen, J.*, in *Tebbetts v. Dowd*, 23 Wend. 379, 386, said: "This notion has long since been exploded." In *Richter v. Selin*, 8 S. & R. 425, 438, *Duncan, J.* said: "His ignorance of the law would not render the promise void. For if, with knowledge of the fact of demand not having been made, he makes a promise under the supposition that he will be still liable at law, it will be valid." So in *Kennon v. M'Rea*, 7 Port. Ala. 175, 184, *Collier, C. J.* said: "And it will make no difference that a promise or acknowledgment was made under a misapprehension of the law; for every man must be taken to know the law; otherwise, a premium is held out to ignorance, and there is no telling to what extent this excuse might be carried." *Carr, J.*, *Pate v. M'Clure*, 4 Rand. Va. 164, 170. See *Schmidt v. Radcliffe*, 4 Strob. 296; *Bilbie v. Lumley*, 2 East, 469, where "Lord *Ellenborough, C. J.* asked the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily, with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law. No answer being given, his lordship continued. The case of *Chatfield v. Paxton* is the only one I ever heard of, where Lord Kenyon, at *Nisi Prius*, intimated something of that sort. But when it was afterwards brought before this court on a motion for a new trial, there were some other circumstances of fact relied on, and it was so doubtful, at last, on what precise ground the case turned, that it was not reported." *Stevens v. Lynch*, 12 East, 38, where the



for there are no good grounds for maintaining that the case of waiver is an exception to the sound maxim, that ignorance of law is an excuse for no one.

The subject of part payment after maturity has been considerably discussed with respect to the question of waiver, and the cases are not entirely in unison. It would seem to be settled, that a mere part payment, with knowledge, is a waiver; (o) but some authorities would appear to hold that part payment alone is sufficient evidence of a waiver, without proof of knowledge, (p) which doctrine is inconsistent with other au-

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court said, on *Chatfield v. Paxton* being referred to: "The court considered those cases to have proceeded on the mistake of the person paying the money, under an ignorance or misconception of the facts of the case; but here the defendant had made the promise with a full knowledge of the circumstances, three months after the bill had been dishonored, and could not now defend himself upon the ground of his ignorance of the law when he made the promise."

(o) *Sherer v. Easton Bank*, 33 Penn. State, 134, where the notice was delivered to the indorser at the proper time, but it stated the demand to have been made two days before maturity. The demand was regular. The note was for \$1,600, of which \$500 had been paid. *Strong, J.* said: "We come, then, to the inquiry whether the court erred in instructing the jury that 'there was evidence of what dispensed with notice to the indorser,' and 'that, if they believed the \$500 was a payment by the defendant, it dispensed with the necessity of proving demand and notice to him, and that it was an acknowledgment of the liability created by the indorsement.' The defendant complains of this for two reasons: first, that it was an invasion of the province of the jury. . . . That a subsequent promise to pay the note by an indorser, who has full knowledge of all the facts, amounts to a complete waiver of the want of due notice, is well settled, and settled as a matter of fact. So does a part payment. . . . If, then, payment of part of a note is, in law, a waiver of notice of dishonor, and not mere evidence of notice, the court in this case withdrew nothing from the jury upon which they had a right to pass. The legal effect of a given state of facts is always for the court. It was submitted to the jury to find whether the defendant made the payment. If he did, the fact that he made it with full knowledge of the circumstances was proved, and was not controverted. All the rest was a legal conclusion." *Harvey v. Troupe*, 23 Missis. 538.

(p) In *Read v. Wilkinson*, 2 Wash. C. C. 514, *Washington, J.* charged the jury, that "The want of funds in the hands of the drawee, the drawer's payment of part of it, and his subsequent acknowledgment of the debt, and promise to send funds to take it up, are either of them sufficient to dispense with notice and protest." In *Levy v. Peters*, 9 S. & R. 125, *Tilghman, C. J.* said: "Whenever the drawer acknowledges himself to be liable to payment, the necessity of proving a demand of the drawee, and his refusal to pay, and notice to the drawer, is dispensed with. Because such acknowledgment carries with it internal evidence that the drawer knew that due diligence had been used by the holder, or even if it had not, that still the drawer confessed that he was under an obligation to pay. And it is immaterial whether there be proof of an express promise to pay, or of other circumstances from which it can be inferred that the drawer acknowledged himself liable; and I take it that payment of part is such a circumstance. And there is good reason for it. For why should part be paid unless

thorities.(q) Part payment may certainly be explained; as, for instance, by the fact that the indorser paid it with money which he had received from the maker for that express purpose.(r)

5. *By whom the Waiver is made.*

In order to make a waiver effectual, it should be the act of the indorser himself, or of his duly authorized agent; because no person can waive another's rights.(s) Thus, it is no excuse for a failure to make a proper demand, as regards an indorser, that the maker told the holder, a few days before maturity, that it

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the payer acknowledged the obligation of paying the whole?" *Curtiss v. Martin*, 20 Ill. 557, where the judge, at *Nisi Prius*, charged the jury that the payment by the drawer, if proved, of any part of the bills after they fell due, was a waiver of presentment to the drawee for acceptance and payment, and notice of non-acceptance and non-payment. Held correct. See *Whitaker v. Morrison*, 1 Fla 25, 34, where *Hawkins, J.* said: "The part payment of a note, not explained or qualified by any accompanying circumstances, will be held to be sufficient evidence of waiver of notice" In *Williams v. Robinson*, 13 La. 419, the drawer of a bill paid a part, and subsequently, on being asked for the balance, said it was a third of exchange, and if he had examined it he would not have paid what he did on it, adding, that at the time the bill was given it was agreed that it should be paid in the place where it was drawn. *Eustis, J.* said: "From these facts it would be left to a jury to infer whether the partial payment was or not made with a knowledge on the part of the drawer of the want of demand, protest, and notice. The knowledge may be inferred from the circumstances attending the payment. The reason for the drawer refusing to pay the balance due on the bill is placed on grounds entirely independent of his knowledge of the state of facts which would exonerate him. . . . We consider the law as settled. that a subsequent promise to pay a bill or note, or a part payment thereof, must be made with full knowledge of the facts of a want of due diligence on the part of the holder, but that affirmative proof of the knowledge is not required. It may be inferred from the promise or payment under the attending circumstances."

(q) *Spurlock v. Union Bank*, 4 Humph 336, where there was a part payment and an acknowledgment of liability. The court seem to have proceeded upon the ground partly, that knowledge was not proved, and partly, that the indorser was ignorant of the law. See the remarks of *Eustis, J.*, cited *supra*, note p.

(r) *Whitaker v. Morrison*, 1 Fla 25. *Hawkins, J.* said: "There was no evidence showing a promise of payment on the part of the indorser, and the bare fact of his delivering the money is not enough. As to this the indorser seems to have acted as the mere agent of the maker, and it would be at variance with all ideas of justice, explained as the occurrence is, that the indorser, acting in the capacity of an agent simply, should be rendered subject to legal liabilities, by the virtual act of his principal." The indorser who has paid the whole of a note in ignorance of laches, may recover the amount of the party to whom he paid it. *Garland v. Salem Bank*, 9 Mass. 408.

(s) In *May v. Boisseau*, 8 Leigh, 164, 180, *Tucker, P.* said: "What is the principle on which notice is waived? It is, that the consequences of neglect to give notice may be waived by the person entitled to take advantage of them. The act, then, which is to operate a waiver must be the act of the indorser himself. It would be a solecism to permit the act of another to waive his right of insisting upon notice."

was no use to present the note, because it could not be paid.(*t*) Such evidence, in fact, is inadmissible.(*u*) So also a promise to pay made by one partner, after dissolution, although binding upon him, has been held not to bind the other partners.(*v*) An offer of composition by the acceptor, not acceded to, with a declaration in the presence of the drawer and holder, that he, the acceptor, had not provided for them, and should not do so, has been held to be no waiver of demand and notice.(*w*) Where there is a written waiver of notice on the back of the note, immediately followed by two indorsements, one under the other, the waiver is the several act of the first indorser, and not that of the second.(*x*) Notice may be given to one joint indorser, and the other may have waived it, and the effect of the waiver by the latter is an acknowledgment of the joint liability.(*y*)

#### 6. *To whom the Waiver is made.*

With regard to the person to whom the waiver should be made, it would seem to be settled, that a promise to a third party, unconnected with and uninterested in the note or bill, is no evidence of waiver ; (*z*) but a promise to the holder himself has been held to enure to the benefit of a party who subsequently takes up the paper,(*a*) and an agreement between the maker and the indorser,

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(*t*) *Lee Bank v. Spencer*, 6 Met. 308.

(*u*) *Pierce v. Whitney*, 29 Maine, 188.

(*v*) *Hart v. Long*, 1 Rob. La. 83. See *Bank of Vergennes v. Cameron*, 7 Barb. 143; and *supra*, pp. 144 - 146.

(*w*) *Ex parte Bignold*, 2 Mont. & A. 633.

(*x*) *Central Bank v. Davis*, 19 Pick. 373.

(*y*) *Sherer v. Easton Bank*, 33 Penn. State, 134.

(*z*) *Olendorf v. Swartz*, 5 Calif. 480; *Jervey v. Wilbur*, 1 Bailey, 453. See *Allwood v. Haseldon*, 2 id. 457; *Miller v. Hackley*, 5 Johns. 375, Anthon, 91, *supra*, p. 599, note *j*.

(*a*) *Kennon v. M'Rea*, 7 Port. Ala. 175; *Rogers v. Hackett*, 1 Foster, 100, where *Gilchrist, C. J.* said: "There is nothing in the case (*Roberts v. Peake*, 1 Burr. 323) cited, which supports the doctrine that a promise to pay a note made by the indorser to the holder could not be given in evidence by a subsequent indorsee, in a suit against the first indorser. No reason occurs to us why the plaintiff should not avail himself of the evidence. An indorser may waive such a defence, or not, as he sees fit. After having waived it, and surrendered it, upon what principle can he reclaim it? He cannot rely upon this defence as existing, or as non-existing, as his caprice or his interest may dictate. There is no need of considering the question whether it could be transferred by indorsement to the plaintiff, for negotiability or non-negotiability cannot be predicated of it. All that can be said of the matter is, that the party has waived his defence, and therefore cannot avail himself of it." See also *Potter v. Rayworth*, 13 East, 417, *infra*, p. 614, note *l*.

whereby the latter is to take up the note, will enure to the benefit of an indorsee in an action against the indorser, (b) as will an engagement between the maker and indorser to extend the time of payment. (c) And wherever the indorser takes security under such circumstances as will amount to a waiver, this must be considered, we think, as a holding out to whatever person may own the bill, that he is the proper party to pay it, and the one primarily liable. (d)

There are a few authorities in which the doctrine that a promise to pay, after maturity, with full knowledge of laches, is held not binding because without consideration. (e) Although this is not now law, yet we think that the objection has certainly some weight. (f) As soon as the holder neglects to take the steps required by law to fix the drawer or indorser, from that moment his liability is at an end. The contract which he entered into, and by which he agreed to be bound, is broken, and he is discharged. How then can he be made liable, except by a new and indepen-

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(b) *Marshall v. Mitchell*, 35 Maine, 221. But in *Baker v. Birch*, 3 Camp. 107, where the acceptor, a few days before maturity, told the drawer that he should be unable to pay the bill, requested the drawer to take it up, and gave him part of the amount, and the drawer received the money, and promised to take it up, it was held that the latter might set up in defence a want of due presentment and notice; but that the money received was money had and received to the plaintiff's use.

(c) *Williams v. Brobst*, 10 Watts, 111.

(d) In *Curtiss v. Martin*, 20 Ill. 557, *supra*, p. 609, the party who took the security was held entitled to avail himself thereof, as a waiver as to him.

(e) *Lawrence v. Ralston*, 3 Bibb, 102. See *May v. Coffin*, 4 Mass. 341; *Chase*, C. J., *Beck v. Thompson*, 4 Harris & J. 531; *Donnelly v. Howie*, Hayes & J. 436, where *Joy*, C. B. said: "Either the judges have been inaccurate in the language they have used, or they have been inaccurately reported, or there has been a fluctuation of opinion upon this subject. . . . I confess I cannot conceive what is the meaning to be attributed to the word 'waiver,' when used in a case like the present, where the defendant has been absolutely discharged by the neglect of the plaintiff. He may waive the communication of a fact; but I do not understand how he can waive the existence of the fact. The law requires that the bill should be presented to the acceptor, when it becomes due, even though the acceptor be a bankrupt; and in my opinion it would be very prejudicial to the mercantile interests of the country, were we to fritter away the known rules of law, by establishing this new-fangled doctrine of waiver. The tendency of the modern decisions of courts of justice is to avoid new distinctions, or extending those which have been already introduced; and to decide cases according to the old, well-known rules of the law. Nor is there any pretence for saying that there is a moral obligation on the defendant, (an indorser,) to pay this bill, whereby the promise might be supported; for the plaintiff, by his own neglect, has discharged every person, except the acceptor of the bill."

(f) Mr. Justice Story, *Prom. Notes*, § 275, has expressed an opinion to the same effect.

dent contract, which requires, like all other contracts, a consideration to support it? The case is not analogous to those where a new promise is relied upon to remove a statutory bar to the remedy, and in which the debt itself, in theory, still exists, while all means of enforcing it are removed; because there is no debt either in theory or in fact. It is not unlikely that the cases by which the doctrine was first established arose with reference to the liability of drawers of bills, where the drawer received the money originally, and was, in fact, morally bound to pay; and the cases result from the doctrine, now repudiated, that a moral consideration is sufficient to support an express promise.<sup>(g)</sup> There is another objection which has been urged, but which rests upon far less secure foundation, that the promise, if by parol, is within the statute of frauds, being a promise to pay the debt of a third party, which is required to be in writing, and is consequently void.<sup>(h)</sup> This objection has, however, been held well taken, where the action was brought on the promise, and not on the note.<sup>(i)</sup>

It has been said that the doctrine applicable to waiver of notice of the dishonor of bills of exchange does not apply to promissory notes. But the distinction is not clearly pointed out.<sup>(j)</sup>

#### 7. *Presumptive Evidence in Reference to Waiver.*

In our discussion of the subject of waiver, we have endeavored to confine our remarks to instances where it appears, either expressly or by implication, that no demand had been made or notice given, or where there were express laches. The same facts and circumstances are now to be considered in another

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(g) In *Hopes v. Alder*, 6 East, 16, note, the counsel for the plaintiff urged that "the subsequent promise to pay, for which there was certainly an equitable consideration, put an end to any doubt. Gibbs, *contra*, admitted that this last objection was decisive." Cowen, J., in *Tebbetts v. Dowd*, 23 Wend. 379, 382, after citing this remark, said: "In short, the force of the promise stands on what is often called in the books, by a latitudinary mode of expression, the consideration of moral obligation; a phrase which can never be judicially understood in its broad ethical sense, as it sometimes has been, without subverting the legal notion of a consideration. It means no more than a legal liability suspended or barred in some technical way short of substantial satisfaction."

(h) This objection was expressly overruled in *U. S. Bank v. Southard*, 2 Harrison, 473, which was an action on the note itself.

(i) *Peabody v. Harvey*, 4 Conn. 119.

(j) *Thompson, C. J.*, in *Agan v. M'Manus*, 11 Johns. 180.

view, and in a totally different connection. There is a very numerous class of cases on the subject, how far a promise to pay, or other circumstances, such as the acts or words of the drawer and indorser, go to prove that they have received notice, or are evidence that a proper demand has been made and notice given. In many of the books on the subject, and in frequent instances in the authorities, the distinction between the two classes of cases is ignored, and cases and principles applicable to the one are cited as authorities, or applied to the facts, in the other. So that the law is in a state of much confusion and uncertainty.<sup>(k)</sup> It is also to be observed, that, from the facts as reported, there is frequently much uncertainty whether there were laches or not, and it is equally uncertain upon what principles the cases were decided. We will first consider the rules of law laid down by the English authorities with respect to presumptive evidence in questions of this kind; and we may remark, that, although the English law seems, generally, to be more strict in its requirements of proof of demand and notice than the American law, yet, on the point of presumptive evidence, the former would appear to be much more lax than the latter, and in some instances, we think, unjustifiably so.

There are several cases which hold that a mere acknowledg-

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(k) The ablest discussion to be found in the reports, and the only one where the principles and cases have been thoroughly treated, is the masterly opinion of Cowen, J., in *Tebbetts v. Dowd*, 23 Wend. 379, which will well repay perusal. The learned judge said, on the point now under consideration, p. 387: "In speaking of this head, I shall hereafter, for the sake of brevity, call it 'waiver,' and I must again repeat, that it is entirely distinct from, and founded on, a state of facts opposed to another ground, on which I think the judgment of the court below still more clearly sustainable than that of waiver. I mean the ground that, where no laches appear in proof, the promise, or other equivocal act of the drawer or indorser, shall be received as *prima facie* evidence that there were no laches; that presentment, protest, notice, &c. were in fact made or given, the promise, &c. thus coming in place of the ordinary direct proof of those facts. It is necessary to adhere with great strictness to the distinction, inasmuch as all the treatises I have seen on bills of exchange or notes confound *waiver* with the *opposite ground*. They state both these grounds together, as if they belonged to the same head, often citing cases in respect to one ground which belonged to the other; thus introducing a degree of confusion into this branch of the law to which the decisions give no countenance whatever; nay, to which they stand directly opposed. And this brings me to the second general head, — presumptive evidence." As to the latter remark concerning the authorities, we shall see that the learned judge is incorrect, because we find the courts, even in the same jurisdiction, applying the principles applicable to presumptive evidence at times, and again deciding in a way which, by no method, can be reconciled with them.



ment of liability, or a promise to pay, after maturity, by a drawer or indorser, is sufficient evidence by which a jury may infer protest, demand, or notice,<sup>(1)</sup> and also a presentment at the

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(1) *Wood v. Brown*, 1 Stark. 217, where the plaintiff, instead of proving notice, &c., gave in evidence a letter of the defendant, a drawer and indorser, stating that the bill would be paid before the next term. Held sufficient. *Taylor v. Jones*, 2 Camp. 105, where the indorser of a note two years after maturity promised to pay, but asked for further time. Held sufficient evidence of presentment and notice. *Gibbon v. Coggon*, id. 188, where the drawer of a foreign bill, on demand being made, said that his affairs were much deranged, but that he would be glad to pay as soon as his accounts with his agent were cleared. Held evidence of protest and notice. Lord *Ellenborough* said: "By the promise to pay, he admits his liability; he admits the existence of everything which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected that there was no protest. Instead of that, he promises to pay it. I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary." *Greenway v. Hindley*, 4 Camp. 52, where the evidence of presentment, protest, and notice of a foreign bill was a statement by one of the drawers that the bill was regular, that it was due from him and his partner, and that he had come to make an arrangement for its payment, with interest. Presentment, protest, and notice were alleged in the declaration. *Lundie v. Robertson*, 7 East, 231, 3 J. P. Smith, 225, where the indorser of a bill promised to pay it if the holder would call again with the account. Held evidence of presentment and notice. *Potter v. Rayworth*, 13 East, 417, where an indorser's promise to pay to a subsequent indorser was held evidence of notice, in an action by an intermediate indorser. Lord *Ellenborough*, C. J. said: "Whether the promise to pay was made to the plaintiff, or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of the dishonor." See *Patterson v. Becher*, 6 J. B. Moore, 319, *supra*, p. 603, note z; *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229, 5 Scott, 598, where the drawer of a bill said: "If the acceptor does not pay, I must; but exhaust all your influence with the acceptor first." The drawer afterwards directed the holder to raise money on his life and that of the acceptor, but the negotiation was afterwards broken off. Held evidence by which the jury might or might not infer notice. *Parke. B., Burgh v. Legge*, 5 M. & W. 418, 419; *Campbell v. Webster*, 2 C. B. 258, where letters from the drawer of a foreign bill containing an admission of liability, or a promise to pay, though conditional as to the mode of payment, were held presumptive evidence of protest and notice. See *Metcalf v. Richardson*, 11 id. 1011, where the drawer of a bill remarked to the holder's clerk the day after maturity, — the latter having said that the bill had been duly presented, and that the acceptor could not pay it, — that he would see the holder about it. Held, that it was properly left to the jury to infer from the conversation that the drawer had due notice. In *Norris v. Salomonson*, 4 Scott, 257, the only evidence of notice to the drawer was the testimony of a witness that the defendant said to him, in reply to an inquiry whether he was aware or not that the bill had been dishonored, "Yes, I have had a very civil letter on the subject from Mr. Gunnell, an intermediate indorsee, and I will call and arrange it." Held sufficient evidence of notice. *Brownell v. Bonney*, 1 Q. B. 39, where the drawer of a bill was told that a subsequent indorser had been sued on the bill, and that as he, the defendant, had received the cash, and knew, the day before maturity, that the bill would not be paid, he ought to pay it. The defendant replied, that he should not avail himself of the informality of the notice, but would pay the bill. Held evidence by which the jury might infer due notice. *Parke, B., Burgh v.*



place where the bill is payable.(*m*) The reason for this is, that it is an admission against interest; that it is highly improbable that a party, knowing, as must be supposed, his legal liability, and what will constitute a discharge of that liability, should admit it, or promise to pay the debt, unless all the proper measures had been taken to cause that liability to attach. Among other circumstances which have been held to be presumptive evidence of demand and notice are part payment, without objection to any want of, or informality in, the presentment and notice; (*n*) an offer to pay a part, (*o*) or to pay by instal-

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Legge, 5 M. & W. 418, 419. In *Jones v. O'Brien*, C. B. 1854, 26 Eng. L. & Eq. 283, the proof was, that the witness could not state positively that he had given proper notice, but produced a note from the defendant, a drawer, saying that he would see the bill arranged. The latter subsequently promised to give a judgment for the amount. The defendant testified that, to the best of his belief, he had no knowledge of dishonor until a fortnight after maturity. The judge told the jury that they must arrive at the conclusion that notice was given the day of maturity: that this might be proved by a promise to pay the bill; but if they believed the defendant, that they should find for him. A verdict for the plaintiff was sustained. *Chapman v. Annett*, 1 Car. & K. 552, seems opposed to these cases. There was no evidence of notice, but the defendant had said that he would try to get the acceptor to pay the bill; that he would call and have the matter arranged; and that he would have the bill taken up. There was a book kept by the plaintiff, in which entries of notices were made. The book was not produced. *Pollock*, C. B., instead of leaving the question to the jury, acknowledged that the defendant's conversation amounted to a promise to pay; but said he was of opinion that there was no notice, and directed a verdict for the defendant. He also said that it was for the court to say whether the promise amounted to a waiver. In an action by a second indorser against the drawer, proof that the defendant had furnished the first indorsee with funds to pay the bill and costs, under a judge's order for a stay of proceedings, will not dispense with proof of notice. *Holmes v. Staines*, 3 Car. & K. 19.

(*m*) *Hodge v. Fillis*, 3 Camp. 463, an action against the acceptor.

(*n*) *Vaughan v. Fuller*, 2 Stra 1246. The following is the report of this case: "In an action upon a promissory note by the indorsee against an indorser, it was proved that the defendant had paid part of the money. And Chief Justice Lee held that sufficient to dispense with the proving a demand upon the maker of the note." *Horford v. Wilson*, 1 Taunt. 12.

(*o*) The authorities on this point are in conflict. In *Dixon v. Elliott*, 5 Car. & P. 437, the bill was shown to the defendant, an indorser, and inquiries were made for the acceptor and drawer. The indorser said if the plaintiff would take 10s. on the pound, he would secure it to them. The offer does not appear to have been accepted. *Park, J.* held the evidence sufficient to dispense with proof of dishonor. In *Margetson v. Aitken*, Danson & L. 187, 3 Car. & P. 338, Lord *Tenterden*, C. J. and *Bayley, J.* held that, if the indorser offers to pay the holder 8s. on the pound, on the amount, this dispenses with proof of notice. The offer was rejected. *Contra*, *Standage v. Creighton*, 5 Car. & P. 406, where there was evidence that notice had been sent addressed to the defendant, an indorser of a bill, at two places, but there was no evidence that he lived

ments ; (p) service of notice to produce at the trial the letter containing notice of dishonor uncomplied with ; (q) objecting to payment upon other grounds than laches in presentment and notice. (r) Some of the cases have almost gone so far, that it would seem that the only safe course for an indorser or drawer, when payment is demanded of him, would be to expressly deny both presentment and notice. Thus, for instance, a verdict against the drawer of a bill was sustained, where the only evidence of notice was, that the defendant, two days after maturity, sent a person to the plaintiff to say that he had been defrauded of the bill, and should defend any action upon it. (s) Whether

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in either. Proof that the defendant's attorney had offered to pay £30 on the bill, which was for £100, and to secure the residue by warrant of attorney, was held not to be sufficient to dispense with proof of notice. The offer does not appear to have been accepted. Lord *Denman*, C. J. said : " I think that that is not sufficient to dispense with proof of the notice of dishonor. The defendant might, if time had been given him, have been willing to have waived any objection with respect to notice of dishonor." In *Cuming v. French*, 2 Camp. 106, note. the drawer, on being arrested, offered as a compromise to give his bill at one or two months. His offer was rejected. Held not to obviate the necessity of demand and notice. Lord *Ellenborough* said : " This offer is neither an acknowledgment nor a waiver, to obviate the necessity of expressly proving notice of the dishonor of the bill. He might have offered to give his acceptance at one or two months, although, being entitled to notice of the dishonor of the bill, he had received none, and although, upon this compromise being refused, he meant to rely upon the objection. If the plaintiff accepted the offer, good and well ; if not, things were to remain on the same footing as before it was made."

(p) *Croxen v. Worthen*, 5 M. & W. 5, an action against the maker of a note payable at a specified place. There was no evidence of a presentment there, which was alleged in the declaration, but the defendant had promised to pay the note by instalments. *Alderson*, B. said : " The defendant is supposed to know the law ; he knows, therefore, that he is not liable, unless the note has been duly presented. With that knowledge, he undertakes to pay it. Is not that evidence for the jury that he knows it has been presented ? " *Gunson v. Metz*, 1 B. & C. 193. 2 Dow. & R. 334, an action against the drawer of a bill. An agreement between the drawer and a prior indorser, reciting that the defendant had drawn, among others, the bill in question, that it was overdue, and ought to be in the hands of the prior indorser, and that the latter should take the money due him on the bill by instalments, was held evidence of notice.

(q) See the cases cited *infra*, note s. See *Campbell v. Webster*, 2 C. B. 258.

(r) See the cases cited *infra*, note s. See *Campbell v. Webster*, 2 C. B. 258.

(s) *Wilkins v. Jadis*, 1 Moody & R. 41, where Lord *Tenterden*, C. J. said : " It will be a question for the jury whether the defendant had received notice from the plaintiff, or some party to the bill. They certainly must be satisfied that notice was given ; mere knowledge of the dishonor is not sufficient. But is there not evidence of notice ? The communication that any action will be defended is not put on the ground of want of notice, but of fraud, and at that time the defendant knew the holders. How was he likely to know that fact, unless by having received notice ? It is a question of fact for the jury, whether he had so or not ; and their verdict will be given accordingly " In

a conditional offer of payment, by way of compromise, which has not been accepted, is evidence of demand and notice, seems

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*Roberts v. Bradshaw*, 1 Stark. 28, the plaintiff's clerk swore, that on the day of maturity the plaintiff gave him two papers to compare with each other, one of which he produced, purporting to be a notice of dishonor of the bill. He stated that, the day after he compared the papers, he carried a letter from the plaintiff to the defendant. This not being held sufficient evidence of notice, the plaintiff then proved service of a notice on the defendant, calling on him to produce a letter from the plaintiff, giving notice of the dishonor of the bill. A verdict for the plaintiff on the above facts was sustained. Lord *Ellenborough* said: "I think certainly that there is a looseness in this evidence, and you may afterwards move the court upon it. Supposing, however, that the paper delivered had been a perfect blank, or contained matter wholly unconnected with the dishonor of the bill, you might have produced it, and shown the fact to be so, since it is evident what letter was the object of the plaintiff's notice. This is the first time the identity of such a letter has been so minutely criticised, and the proof might, in many instances, be attended with great difficulty; as where letters, after being written, are placed upon the table, it might afterwards be exceedingly difficult to identify them with those afterwards put into the post-office." In the ensuing term, the court refused a rule *nisi* for a new trial. In *Booth v. Jacobs*, 3 Nev. & M. 351, an action against the drawer, on two bills, one drawn on Fenton and the other on Phillips, a verdict for the plaintiff was sustained, on the ground that the following letter, written six days after maturity, was evidence of due notice of both bills. "Your letter this day came to hand. We were rather surprised at the latter part of your letter, wherein you state you would take proceedings against us. We fully expected that Phillips's bill would have been paid. It will be impossible for me to go out of town to settle our accounts till after Christmas, when we will remit you some cash. Trade is at a stand still in London at present. We have been doing very little business for these last three weeks, as we are determined not to give any more credit having had such severe losses lately. We have taken up £100 of return bills of Mr. Fenton's, besides other bills on other shops which were returned, which makes us short of cash at this present time. I have called this day on Mr. Phillips about his bill. He was not at home. I will call again to-morrow. You may make yourselves very easy about what we owe you. I will write to you again in a day or two. Law expenses do neither party any good." It is somewhat difficult to see what evidence of due notice of both bills is contained in this letter. In *Bell v. Frankis*, 4 Man. & G. 446, 5 Scott, N. R. 460, the defendant, a drawer, told the witness he expected to receive by post a notice of dishonor of the bill; and afterwards gave him a letter which he had received by-mail, and requested him to negotiate a renewal of the bill. The letter, which was in the plaintiff's hands, was not produced at the trial. Held evidence of due notice, but a verdict for the defendant was not disturbed. In *Curlewis v. Corfield*, 1 Q. B. 814, 1 Gale & D. 489, the plaintiff proved that he sent a letter to the drawer, which was put into the letter-box of the latter, an attorney, at his office. A service of notice on the defendant, calling on him to produce a letter sent to him that day, containing notice of dishonor of the bill, was also proved: and the defendant failed to produce it. After this time the defendant told the plaintiff's attorney that the bill had not been presented in due time, saying nothing about notice. A verdict for the plaintiff was sustained, on the ground that the above facts were evidence of due notice. Lord *Denman*, C. J. said: "Taking the whole of this case together, I think there was evidence to go to the jury. The plaintiff proved that some letter was put into the defendant's box on Sept. 28th; and that notice to produce, not

to be unsettled; the authorities being, as has been seen, *(t)* in a state of conflict. With regard to the person to whom the promise or acknowledgment is to be made, it has been held, as has been remarked, *(u)* that a promise to a subsequent party enures to the benefit of an intermediate party who has taken up the paper. The courts in England, in the late cases, seem to show a disposition to shift from the position of waiver to that of presumptive evidence, and it is not impossible but that they may have abandoned the former doctrine. *(v)*

Many of the American authorities are so far inconsistent with the English cases which we have just examined, that it is not certain whether the courts, in some instances, recognize the doctrine of presumptive evidence at all. This may have arisen from confounding the distinction between waiver and presumptive evidence, or because that distinction does not seem to have been presented for consideration. *(w)* In some cases, the courts

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complied with, must have some effect. To this is added the conversation with the plaintiff's attorney, in which the defendant placed his defence on a different ground from that of omission to give notice of dishonor. The case, therefore, is like *Wilkins v. Jadis*, 1 Moody & R. 41, *supra*. *Patteson*, J. said, that, without the conversation, the evidence would not probably be sufficient. See *Brett v. Levett*, 13 East, 213, where want of notice to the drawer of a bill due Jan. 28th, he having become bankrupt on Dec. 28th, was supplied by evidence that he said, on a day subsequent to the latter date, on being asked by the plaintiff whether the bill would be paid, "No, it will come back."

*(t)* See the cases cited *supra*, p. 616, note s.

*(u)* *Potter v. Rayworth*, 13 East, 417, *supra*, p. 614, note l; *Ganson v. Metz*, 1 B. & C. 193, *supra*, p. 616, note p.

*(v)* Thus, in *Hicks v. Duke of Beaufort*, 4 Bing. N. C. 229, *supra*, p. 614, note l, the promise was certainly as clear as in the case of *Rogers v. Stevens*, 2 T. R. 713, *supra*, p. 598, note h, and other earlier cases. Inasmuch as it was a question of notice, the point whether the defendant knew whether he had received it or not might have been raised. But the jury were directed simply to find whether there had been notice or not. So in *Brownell v. Bonney*, 1 Q. B. 39, and in *Jones v. O'Brien*, C. B. 1854, 26 Eng. L. & Eq. 283, cited *supra*, p. 614, note l, from the evidence, there certainly was ground to contend that there had been actual laches, and knowledge; but the court decided on the ground of presumptive evidence, and not upon that of waiver. *Houlditch v. Cauty*, 4 Bing. N. C. 411, seems to have been decided, however, on the ground of waiver. See the remarks of *Joy*, C. B., cited *supra*, p. 611, note e. It is somewhat singular that the Chief Baron should characterize waiver as "this new-fangled doctrine"; because the fluctuation appears to be from that doctrine, which is clearly laid down by the earlier cases, to that of presumptive evidence, which is later.

*(w)* *Thornton v. Wynn*, 12 Wheat. 183, seems hardly reconcilable with the English cases. The court below admitted the following evidence as competent to support the action against an indorser of a note, without further proof of demand and notice. The defendant, on demand being made of him, said he knew the maker had not, and was not, to pay the note; that it was his concern alone, and that the maker had nothing to

seem unwilling to carry out the doctrine to such an extent as is done by the English authorities. Thus there is certainly ground to contend, on these authorities, that, if an indorser takes security after maturity, this is evidence of demand and

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do with it. *Washington, J.*, p. 188, admits that "these declarations amounted to an unequivocal admission of the original liability of the defendant to pay the note." This would seem sufficient to come within the English authorities; but the court decided that the defendant could not be held, because there was no proof of knowledge of laches at the time the declarations were made. In *Davis v. Gowen*, 17 Maine, 387, the only proof of demand and notice was, that notices for the maker and indorser were deposited in the post-office on the day of maturity; all the parties residing in the same town. The defendant told the plaintiff's attorney that, if he would not sue the note, he would immediately see it paid. Suit was accordingly delayed, and the defendant afterwards made similar promises. Held, that the court should have instructed the jury that the action could not be maintained, because the facts do not show knowledge of laches. See *Crain v. Colwell*, 8 Johns. 384, where the indorser promised "to turn out notes." The plaintiff refused to receive them, and subsequently the defendant refused to deliver them. *Beekman v. Connelly*, cited 16 Johns. 154, where it was held that mere proof of a promise to pay, without evidence of knowledge of laches, does not dispense with proof of regular notice. *Trimble v. Thorne*, 16 Johns. 152, where the notice to the indorser was held insufficient, because it was deposited in the post-office of the town in which he lived. The defendant had called on the plaintiff's attorney, admitted his liability, and promised to pay the note, offering to pay part in cash and the balance by notes. The proposition was acceded to, but the defendant neglected to carry it out, and suit was then brought. The plaintiff was nonsuited, for not proving knowledge of laches. With regard to this case it may be remarked, that the presumption in fact, though not in law, is, that a party would be more likely to receive a drop-letter than if it had been mailed to him from a distant place. The defendant might also be supposed to know whether he had received notice or not. This case, however, as will be seen, has been overruled, and its authority frequently denied. It is affirmed in *Jones v. Savage*, 6 Wend. 658, where the drawer, after suit, requested a delay of proceedings, and after some negotiation the defendant promised to make an arrangement satisfactory to the holder. The defendant also included the amount of the holder's claim, in an account of his creditors, on an application for his discharge in insolvency. Held insufficient to charge the defendant, without proof of knowledge. *Barkalow v. Johnson*, 1 Harrison, 397, where there was some slight evidence of demand and notice. The defendant after suit admitted his indorsement and his liability, and offered to pay part in cash and the balance by note. The propositions were not acceded to. Held not sufficient to support the action, principally because no knowledge of laches was proved. *U. S. Bank v. Southard*, 2 Harrison, 473, where a promise to pay the note by an indorser as soon as he could was held insufficient to support an action, on the ground of want of knowledge. In *Sussex Bank v. Baldwin*, 2 Harrison, 487, the demand was regular, and there was evidence that the notice had been mailed the next day after dishonor, but it was not proved to have been put in the office in time for the mail of that day. The defendant had admitted that he had received a notice through the bank, and had requested the plaintiff twice to renew the note. Held not sufficient evidence to maintain the action. In *New Orleans Bank v. Harper*, 12 Rob. La. 231, *Lacoste v. Harper*, 3 La. Ann. 385, the notice was held bad because it was not directed to the post-office nearest to the residence of the drawer.

notice; for why should a person take these steps to secure himself, unless his liability actually existed? But the contrary appears to have been decided.<sup>(x)</sup> There are cases in which the courts recognize the English law, but deny its authority;

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A subsequent promise to pay by the latter was held insufficient to support the action. So *Glenn v. Thistle*, 1 Rob. La. 572, where notice was held defective because the post-office was used as a means of deposit. There was also evidence that the defendant usually got his letters there, and of a promise to pay. The plaintiff was nonsuited because no knowledge was proved. In *Harris v. Allnutt*, 12 La. 465, the notarial certificate of notice was held insufficient on account of informality. When payment was demanded of the indorser, he promised to go to his immediate indorser and arrange the note. The prior indorser, who was also a defendant, offered to give other notes for the amount. The subsequent indorser said that he would see that the prior one gave the notes. A judgment for the plaintiff was reversed, and a nonsuit entered for want of proof of knowledge. So in *Tickner v. Roberts*, 11 La. 14, the protest was held no evidence of demand, because not duly authenticated. The defendant, a drawer, promised to pay. The drawer was discharged for want of evidence of knowledge of laches. In *Laporte v. Landry*, 17 Mart. La. 359, 16 id. 125, the notice was held bad, because deposited in the post-office where the indorser lived. The defendant offered to indorse notes of the same maker for the same amount, but the holder wished him to give his own note. The plaintiff was nonsuit. In *Bank of U. S. v. Leathers*, 10 B. Mon 64, the evidence of presentment and notice was the notarial certificate of protest, which was held no evidence of the facts, because the instrument was a note. A promise, ten years after maturity, to pay the note, was held insufficient, there being no proof of knowledge of laches. It may be, however, that in some of the above cases there was actual laches; but this fact is neither given by the report of the cases nor adverted to in the opinions.

(x) *Otsego Co. Bank v. Warren*, 18 Barb. 290, where the notarial certificate of demand on the acceptor of an inland bill was held defective for informality. It does not appear whether notice was given or not. *Tower v. Durell*, 9 Mass. 332, where there does not appear to be any other evidence of demand. No facts are reported which are inconsistent with the fact that the demand and notice might have been regular in both cases. The courts decided them on the ground of waiver, and did not notice the one now under consideration. With regard to conditional promises, not accepted, it will be seen that in some of the cases cited *supra*, p. 618, note *v.* there were such instances, and they were noticed in the opinions of the court. In *Bank of Vergennes v. Cameron*, 7 Barb. 143, an action against the indorser of a foreign bill, a memorandum at the foot of the draft, made by the notary and signed with his initials, stating the protest, the mailing of the notices to the drawer and indorsers, and the place to which they were sent, was held no evidence of notice, even in connection with the fact that the defendant, within three days after maturity, exhibited to a witness a notice which he had just received through the post-office. The bill was payable in Burlington, Vermont, and the indorsers lived in Troy, New York. There was also evidence that one of the defendants, who were partners, had admitted the protest, and promised to do all in his power to see the draft paid; but it did not appear whether this promise was made before or after the dissolution of the firm. In *Carter v. Burley*, 9 N. H. 558, the indorser agreed, when informed of the dishonor of the note, to give certain merchandise as security. Held not to be *prima facie* evidence of due demand and notice. *Contr.*, *Debnys v. Mollere*, 15 Mart. La. 318, where the defendant offered to give a mortgage as



so far, at least, as a promise to pay is concerned.(y) The weight of American authority is, however, in favor of the English rule, and there are many cases which hold that a promise to pay, or an acknowledgment of liability, is presumptive evidence that everything has been properly done, in order to render an indorser or drawer liable.(z) There are also cases which hold

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security for the note, which was held equivalent in this respect to a promise to pay. In *Jones v. Savage*, 6 Wend. 658, *supra*, p 619, note *w*, and *Moore v. Hardcastle*, 11 Md. 486, notice was sent to the shire town of the county where the defendant lived. Held insufficient, because due inquiries were not proved to have been made, and there was a nearer post-office. The following letter was held to be no evidence of notice: "Mr. Tarr informs me that you positively refused to deduct one cent on the negotiable note indorsed by me. Now, sir, I made a very reasonable request, merely to deduct the interest. I do not, I assure you, feel able to pay the principal. My means are limited; but I have some friends that would no doubt assist me. I told you, if you would do it, you should have your money this fall, without any trouble. You refused the overtures, though I think extremely moderate." The letter ended with a defiance to the plaintiff to collect the note if he could.

(y) *Otis v. Hussey*, 3 N. H. 346, where *Richardson*, C. J. said: "We are aware that it has been held in England that a promise to pay is, in these cases, to be left to the jury, as evidence of a demand. In an old commercial country like England, where a great portion of the business has long been transacted by means of negotiable paper, and where most of those who deal in such paper must be presumed to be acquainted with the law in relation to it, it may be proper to leave it to a jury to infer a demand of the maker from a promise of the indorser to pay. But in this State, where negotiable paper has a very limited circulation, there is no ground on which such an inference from that fact can rest; and we are of opinion that the rule adopted in New York is the true one. It must be shown affirmatively that the defendant had notice, when he made the promise, that no demand had been made, and that there had been no attempt to make one." So in *Farrington v. Brown*, 7 N. H. 271, where the plaintiff, instead of proving demand and notice, offered the following writing, addressed to the plaintiff's counsel, as evidence: "Portsmouth, July 15th, 1828. I hereby hold myself accountable for the payment of a note signed by Jonathan Brown, payable to me, and indorsed by me, dated April 1st, 1828, payable in sixty days, for \$88.32, now in your hands for collection." See *Carter v. Burley*, 9 N. H. 558, where the indorser offered to give security; *Nelson*, C. J., *Keeler v. Bartine*, 12 Wend. 110, 119.

(z) *Bank of U. S. v. Lyman*, 20 Vt. 666; *Collamer*, J., *Russell v. Buck*, 11 Vt. 166, 175; *Bennett*, J., *id.* 182. See *Nash v. Harrington*, 1 Aikens, 39, 2 *id.* 9; *Hosmer*, C. J. *Breed v. Hillhouse*, 7 Conn. 523, 528; *Bruce v. Lytle*, 13 Barb. 163; *Tebbetts v. Dowd*, 23 Wend. 379; *Pierson v. Hooker*, 3 Johns. 68; *Loose v. Loose*, 36 Penn. State, 538; *Duvall v. Farmers' Bank*, 9 Gill & J. 31, 7 *id.* 44, where the following written agreement was held evidence of presentment and notice, with reference to a note which was overdue at the date of the agreement: "Whereas I am indorser," &c., "and whereas the bank, which holds the notes, has agreed not to protest the same, or to ask a renewal of them when they become due, I do hereby agree to dispense with all notice of the time of payment, or of the non-payment of said notes, and to be answerable for the amount of said notes, although no such notice is given to me." See *Walker v. Lavery*, 6 Munf. 487; *Pate v. M'Clure*, 4 Rand. Va. 164; *Higgins v. Morrison*, 4 Dana, 100, where the indorser of a bill said he would pay if his co-indorser



that demand and notice are proved by part payment; (a) a promise to pay by instalments; (b) the insertion of a bill among the debts of an insolvent in his schedule; (c) a written admission of the reception of notice; (d) a request to have the note kept charged in a separate account, with no objection to the account when rendered, as to the bill, but simply to claim for an additional item of credit; (e) an agreement with the maker to take back the note, and to return the property for which it was given, to the maker; (f) an agreement to let judgment go by default, if the holder would sue the defendant and the maker jointly, in the State court, instead of the defendant alone, in the United States court; (g) part payment by the maker, indorsed on the note on the day of maturity. (h)

The distinctions between the two classes of cases, which we have been considering are well marked, and among them may be mentioned the following. In the waiver cases, there must be proof that the party who made the promise had knowledge of

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would, and subsequently called on the latter, and desired to see some securities given by the drawer. In a bill in equity, he did not rely upon the want of notice; and the co-indorser had taken up the bill. Held evidence of notice, and that the defendant was liable to his co-indorser for contribution. See *Lawrence v. Ralston*, 3 Bibb, 102; *Kennon v. McRea*, 7 Port. Ala. 175; *Schmidt v. Radcliffe*, 4 Strobl. 296; *Hall v. Freeman*, 2 Nott & McC. 479; *Robbins v. Pinckard*, 5 Smedes & M. 51; *Offit v. Vick*, Walker, 99; *Clayton v. Phipps*, 14 Misso. 399; *Dorsey v. Watson*, id. 59; *Mense v. Osborn*, 5 id. 544; *Walker v. Walker*, 2 Eng. Ark. 542; *Oglesby v. Steamboat*, 10 La. Ann. 117; *Union Bank v. Grimshaw*, 15 La. 321; *Debuys v. Mollere*, 15 Mart. La. 318; where the defendant offered to give security. This case is *contra* to *Carter v. Burley*, 9 N. H. 558. It may be remarked, that in some of the above cases the distinction between waiver and presumptive evidence does not seem to have been drawn with precision. Cowen, J., in *Tebbetts v. Dowd*, 23 Wend. 379, with respect to the cases which deny the doctrine of presumptive evidence, said, p. 403: "But, moreover, a decisive answer to the case is, that the mass of American authority against it is as overwhelming as the British." However it might have been when that case was decided, we think that there is not at present such a preponderance of authority as will be seen by comparing the cases cited in this note with those cited *supra*, p. 619, note *w*.

(a) *Bank of U. S. v. Lyman*, 20 Vt. 666; *Sherer v. Easton Bank*, 33 Penn. State, 134; *Levy v. Peters*, 9 S. & R. 125; *Bibb v. Peyton*, 11 Smedes & M. 275. See *Union Bank v. Grimshaw*, 15 La. 321.

(b) *Union Bank v. Grimshaw*, 15 La. 321.

(c) *Hyde v. Stone*, 20 How. 170. *Contra*, *Jones v. Savage*, 6 Wend. 658.

(d) *Commercial Bank v. Clark*, 28 Vt. 325.

(e) *Bank of U. S. v. Lyman*, 20 Vt. 666.

(f) *Andrews v. Boyd*, 3 Met. 434.

(g) *Robbins v. Pinckard*, 5 Smedes & M. 51.

(h) *Lane v. Steward*, 20 Maine, 98.

the neglect, and the burden is upon the plaintiff to prove this. In the cases on presumptive evidence there can be no such requirement, and the cases on this subject, in which the defendant has been discharged for want of such proof, are entirely inconsistent with the doctrine itself. For upon what is it founded, unless upon the ground that the presentment was regular, and the notice duly given? Hence, to say that there must be knowledge of neglect would be, as has been remarked, a legal solecism.<sup>(i)</sup> But there appear also to be authorities in which the opposite mistake has been made. Thus it has been said, in a Treatise on Bills, that <sup>(j)</sup> “a promise to pay will entirely dis-

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(i) *Cowen, J.*, in *Tebbetts v. Dowd*, 23 Wend. 379, 392, after citing the English cases, said: “In this whole score of cases, and more, ranging from 1730 to 1839, no trace of the rule appears, that, in order to make the promise available as an admission, it is necessary to show that the drawer or indorser was aware of laches, which the promise was intended to cure. A remedy for laches is not the object. To require knowledge of laches would render every case going on the principle of presumptive evidence a legal solecism. The ground is, that the promise shall be received, not as binding *per se*, but as evidence that there were no laches; in other words, that regular presentment had been made, that it was followed by non-acceptance or non-payment, of which notice had been duly given. Otherwise, why should the man promise? Will any one do so without knowing that he is liable? Common experience shows that he will not. The English cases are therefore in exact accordance with the principles of presumptive evidence. These principles are but another name for such connections between moral causes and effects as are evinced by general observation.” The case of *Trimble v. Thorne*, 16 Johns. 152, which is overruled by this case, was denied by *Hosmer, C. J.*, in *Breed v. Hillhouse*, 7 Conn. 523, who said that “this case, so far as my knowledge extends, stands alone and unsupported.” So *Bennett, J.*, in *Russell v. Buck*, 11 Vt. 166, 183, said: “It is believed this case is opposed to the whole current of decisions, and establishes a rule of evidence not supported upon principle or by authority.” *Collier, C. J.*, *Kennon v. McRea*, 7 Port. Ala. 175, 183; *Strong, J.*, *Loose v. Loose*, 36 Penn. State, 538, 545.

(j) *Byles on Bills*, p. 237, citing *Taylor v. Jones*, 2 Camp. 105; *Stevens v. Lynch*, 12 East, 38, 2 Camp. 332. But neither of these cases bears out the proposition. The first case was one of presumptive evidence. The only evidence of presentment of the note and notice was, that the indorser, two years after maturity, promised to pay, and requested time. *Bayley, J.*, 2 Camp. 105, “held that, where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when due to the acceptor or maker, and to receive notice of its dishonor, promises to pay it, this is presumptive evidence of the presentment and notice, and he is bound by the promise so made.” This latter clause, although it may seem to support the doctrine contended for, is altogether too uncertain. The judge may have intended to have said that it was binding only until laches appear. Or, in other words, that here is evidence of due presentment and notice, and nothing to control it; or to show that there were laches. Hence a jury might be “bound,” under such circumstances, to find for the plaintiff. In the second case, the promise was held binding because actual knowledge was proved. Lord *Ellenborough*, as reported in 2 Camp. 332, allowed that ignorance “would do away the

pense with proof of presentment or notice, and will throw on the defendant the double burden of proving laches, and that he was ignorant of it." This same principle seems to have been affirmed by some authorities.<sup>(k)</sup> But so far as presentment is concerned, this cannot be reconciled with either doctrine. Not with that of presumptive evidence; for as soon as the defendant has proved laches only, the plaintiff's case is gone, for there can be no presumption of due presentment when there is actual

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effect of the acknowledgment and promise, but it appeared that the defendant was fully acquainted at the time " with the circumstances.

(k) *Loose v. Loose*, 36 Penn State, 538, where *Strong*, J. said: "There was proof on the trial, that, some four or five weeks after the indorsement of the notes to the plaintiff, they having been overdue when indorsed, the defendant stated that he was fast, acknowledged his liability, and promised to pay them. In reference to this proof, the court instructed the jury, in substance, that they might infer from it that the notes had been duly presented to the maker for payment, and that notice of his default had been given in time to the defendant, or that demand and notice had been waived by him. The jury were also instructed, that they might infer from the defendant's promise that he had full knowledge of the facts at the time he made it; and that if his acknowledgment of liability and his promise to pay were made in mistake, the burden was upon him to prove it. This instruction is supposed to have been erroneous. The defendant contends, not that an acknowledgment of liability and a promise to pay, made by an indorser after default of payment by the maker, will not dispense with proof of demand and notice of non-payment, if made with a full knowledge of the facts that there had been laches in the presentation and notice, but he insists that it is incumbent upon the holder to adduce evidence that the indorser had such knowledge, and that it cannot be inferred from his promise to pay. In other words, it is argued that the burden is upon the holder to show by distinct evidence that the promise was not made in mistake, or in ignorance of the existence of laches. This position cannot be maintained. What is the precise effect of a promise to pay, made by an indorser after a note or bill has fallen due and been dishonored, has been a subject much debated. Many of the cases hold that it amounts to an admission that a proper demand was made, and that due notice was given. If it be such an admission, it is not apparent how it can be necessary to prove, in addition to an indorser's promise, that he knew no sufficient demand had been made or notice given. Other cases, perhaps more numerous, hold that a promise to pay, or an acknowledgment of liability, is a waiver of due presentation and notice; and some cases treat it both as a waiver and an admission. Regarding it as a waiver, it of course must be essential that the party making it knew the laches which he is alleged to have excused, for waiver is not without intention. There is, however, very great harmony in the decisions in holding that a promise or acknowledgment itself raises a presumption that the drawer of the bill, or the indorser of the note, was acquainted with the laches of the holder, which his promise is alleged to have waived. I know of but one case in which the opposite doctrine has been distinctly asserted, and that is the case of *Trimble v. Thorne*, 16 Johns. 152, and it has often been spoken of with disapprobation by other courts." So far as presentment is concerned, it would seem somewhat astonishing that the judge should say that there was "very great harmony" in the decisions that a promise to pay raises the presumption of knowledge of laches. According to the cases cited *supra*, p. 601, note x, over thirty in number, the "harmony" would appear to be

proof of laches. Nor can it be reconciled with the doctrine of waiver. For as soon as the defendant proves laches, the plaintiff is bound to prove that the former had knowledge of the laches at the time of the promise. As to notice, the rule may be properly stated,<sup>(l)</sup> though it is not supported by all the authorities,<sup>(m)</sup> on the ground that a promise to pay, as regards notice alone, may be held to be *prima facie* binding, because the defendant may be presumed to know whether he received notice or not; and it is incumbent on him to remove this presumption

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directly the other way; and the rule laid down in this case is not supported by more than two or three cases, and it is somewhat doubtful if it is by any. As to notice, we do not see how the cases can be reconciled. *Supra*, p. 603, note *a*, 604, note *b*. *Collier*, O. J., in *Kennon v. McRea*, 7 Port. Ala. 175, 184, cited the remark from Byles with approbation, and the cases cited by that author; and also *Nash v. Harrington*, 1 Aikens, 39, 2 id. 9. This last case is doubtful authority on the point for which it is cited. The note was on demand, dated Jan. 30th. The demand was made Dec. 5th, and notice given Dec. 7th. The maker at the time of indorsement was notoriously insolvent, and continued so till the trial. The first point which arose was, whether the demand was not too late, or whether due diligence had been used. The court, after stating that "it would not seem reasonable to apply to this case that law merchant which is made to apply to notes given by good responsible men, and negotiated before they become payable," which is not law, said that they were "not fully prepared to say whether this was or was not reasonable diligence." They decided that the judge was wrong in refusing to admit evidence that the defendant acknowledged his liability, and promised to pay. They seem to have put their decision partly upon the ground that the evidence was admissible to show that due diligence in giving notice was used. With regard to knowledge, *Hutchinson*, J. said: "This promise must be *prima facie* binding; but the defendant urges that it is not binding, unless he, at the time of the promise, knew of the laches, which operated to discharge him. It is true such a promise, made in total ignorance of a defence, which existed, would not bind; but nothing appears but that the defendant knew every circumstance; and if he would exonerate himself from his promise, on this ground, the burden of proof rests on him. For he could not be ignorant of the time when notice was given him of the non-payment." This last clause would seem to show that, even as to knowledge, the court decided that a promise to pay raised that presumption with regard to notice, which was the point under consideration, on the ground that the indorser must have known whether he received it in due time.

(l) See *Nash v. Harrington*, 1 Aikens, 39, 2 id. 9, *supra*, note *k*.

(m) The facts in *Loose v. Loose*, 36 Penn. State, 538, were as follows. The notes were overdue at the time of indorsement. It does not seem to have been disputed but that the demand, which was made four days subsequent to indorsement, was within due time. The question was, whether the notice was regular, which was given fourteen days after the demand. There was evidence of a promise to pay, admission of liability, &c. The presiding judge seems to have instructed the jury, that, as to notice, the promise was either evidence that a prior notice had been given, or that it raised the presumption that the defendant knew that he had not received it at the proper time. The decision is, that the charge was correct, but the language of *Strong*, J. is stronger than the facts would seem to warrant.

by proof of ignorance of laches. It would be more accurate, according to the authorities, to state the rule as to presentment as follows: A promise to pay throws the burden on the defendant to prove laches, but the burden is again shifted to the plaintiff to prove knowledge, so soon as laches are shown. Another distinction between the two classes of cases is, that in those of waiver greater strictness is required as to the evidence of the promise than in those to the point of presumptive evidence. This distinction may be seen from the instances which we have already given. Another distinction is, that questions of waiver would seem to be more matter of law than those of presumptive evidence. All that is required in the former is, to prove the promise sufficiently clearly, and knowledge; but in the latter, the indorser or drawer will be able to repel the presumption, either by showing actual laches,<sup>(n)</sup> or any other circumstance going to show neglect.<sup>(o)</sup> Thus even a written admission by the indorser that he had received due notice is only *prima facie* evidence, and may be rebutted.<sup>(p)</sup> The advantage of allowing an admission of an indorser or drawer to operate as an admission of due demand and notice, or presumptive evidence, may be seen in cases where the usual methods of proving them are unavailable; as, for instance, where the party who made the demand and gave the notice is dead, and where a notarial certificate or record is inadmissible evidence.<sup>(q)</sup> It would also seem beneficial where the evidence is defective for some reason rather technical than just; as, for instance, in case where the

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(n) *Bruce v. Lytle*, 13 Barb. 163.

(o) *Lawrence v. Ralston*, 3 Bibb, 102; *Sharkey, C. J., Robbins v. Pinckard*, 5 Smedes & M. 51, 73; *Bibb v. Peyton*, 11 id. 275. In *Hyde v. Stone*, 20 How 170, the insertion of the bill among the debts of the insolvent, upon his schedule, was held evidence of notice, the sufficiency of which is for the jury, and not subject to review in the Supreme Court of the United States. See *Ricketts v. Toulmin*, 7 Law J., K. B. 108; *Jackson v. Collins*, 17 Law J., N. S., Q. B. 142.

(p) *Commercial Bank v. Clark*, 28 Vt. 325. In *Duvall v. Farmers' Bank*, 9 Gill & J. 31, the agreement relied on was written, but held subject to be rebutted by other proof.

(q) *Sharkey, C. J.*, in *Robbins v. Pinckard*, 5 Smedes & M. 51, 72, said: "The notary, it seems, died after suit brought, and before trial; and in such cases it is competent to resort to secondary evidence. This may account for the inability of the plaintiff to prove notice, and furnish a reason why no such proof was attempted. Under such circumstances, it is peculiarly proper to open the door for the admission of presumptive evidence, and the promises of the defendant were sufficient to raise the strongest presumptions against him."

proof of notice is that it was deposited in the post-office of the town where the indorser lives. There is certainly in such cases, under the existing regulation of the mails, more probability that a notice so deposited will reach the party for whom it is intended than if it were mailed for a distant place. Because in the first instance there are only the chances of neglect in one post-office to be considered, while in the latter there are generally the chances of neglect in several offices, and the risk of negligence and loss incurred in the transportation of the mail from place to place to be taken into account.

## SECTION V.

### GENERAL REMARKS ON THE SUBJECT OF EXCUSE FOR NON NOTICE.

It has already been stated, that a notice duly sent by a subsequent to a prior indorser enures to the benefit of the intermediate indorsers; (r) therefore an indorser who has been compelled to take up a note may show, by way of excuse for not giving notice himself to the indorser whom he wishes to hold, that one of the subsequent indorsers gave due notice to the defendant. In the cases which support this doctrine there appears to have been an actual reception of the notice, and it would seem to be still unsettled whether the rule applies to such cases only. Thus, as has already been said, (s) if the holder, after making the necessary inquiries, and using due exertions to find where an indorser lives, should send the notice to the wrong place, the indorser would be liable to him, although the notice was never received. The question might arise here, whether these facts, or this excuse, would so far enure to the benefit of an intermediate indorser who has been compelled to take up the bill, his liability being undoubted, that they would constitute a valid excuse, in his behalf, for not himself notifying the indorser. There would seem to be good reason for holding him liable, upon the ground that the intermediate indorser, upon payment of the bill, was subrogated to the rights, and stood in the place of the subsequent indorser. We are aware of only one case in which

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(r) *Supra*. n. 504, note a.

(s) *Supra*, p. 496, note h.



this question was presented distinctly for adjudication. In this the indorser sued was held liable in the court below, and this decision appears to have been overruled by a higher tribunal in the same jurisdiction. The facts of the case, however, show that the plaintiff was himself the principal cause of the notice having been missent; and that he actually knew where the defendant resided, and, by implication at least, that the notice had been transmitted to the wrong place.(t)

It is a sufficient excuse for delay in presenting a note or bill payable on demand or at sight, to prove that it has been put into circulation by different parties,(u) and the same would doubtless be true with respect to notice. But where a note or bill on demand has been actually dishonored on presentment, the indorser is entitled to notice within the same time as in the case of other notes and bills,(v) unless the paper has come into the hands of a holder in good faith, ignorant of the laches of the party who presented it, and who is not himself negligent in taking the necessary steps to fix the liability of the indorser.

Notes and bills in which no time for payment is specified stand upon the same footing,(w) and, in many respects, so do

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(t) *Beale v. Parish*, 24 Barb. 243, overruled 20 N. Y. 407. The plaintiffs had indorsed to a bank; and the notary, after inquiring at the bank, which could give no information, gave notice to the plaintiffs, and asked them where he should send the notice to the first indorser. They answered that he should send the notice to Dunkirk or Buffalo, and requested him to forward the notice to both places. The plaintiffs knew that the indorser resided in Canandaigua, and gave their direction through misapprehension, there being no pretence of intentional misrepresentation on their part. The Supreme Court held the defendant liable, mainly on the ground of subrogation, *Roosevelt*, J. delivering a short opinion to this effect. *Peabody*, J. dissented, mainly on the ground that the right of subrogation did not exist, but alluded to the "careless misdirection" of the plaintiff. *Grover*, J. delivered the overruling opinion of the Court of Appeals, which proceeded on two grounds. One was, that the bank was bound to send a new notice as soon as it discovered the mistake in the first, and therefore could not have recovered on the note, had they continued to hold it. But this seems in direct contradiction to *Lambert v. Ghiselin*, 9 How. 552, which holds that, if a notice be sent after reasonable diligence, although ineffectually, the right of action at once accrues. The other ground was, that if the bank had the right of action, it did not pass by subrogation to the plaintiff, and that "there is no authority for holding that an excuse for the omission to serve notice by the holders shall extend to other parties for whom there is no such excuse."

(u) *Supra*, p. 268, note d.

(v) *Supra*, p. 519, note m.

(w) *Supra*, p. 381.



notes indorsed after maturity; (x) but there are authorities in which it is said that notice sent within two months after a demand of such a note was sufficient, (y) and that no notice was necessary. (z)

It may be laid down as a universal rule, that neither knowledge or the probability, however strong, that a note or bill will be dishonored, (a) nor mere knowledge that the bill has been dishonored, not obtained in the regular manner, and from a party who has the right to give notice, is the equivalent of legal notice; and hence it does not constitute any excuse for failure to give this in the proper manner. (b) It has been said, that the

(x) *Supra*, p. 268, note g, p. 381, note j.

(y) *Supra*, p. 519, note q.

(z) *Supra*, p. 519, note r.

(a) *Cresswell*, J., *Caunt v. Thompson*, 7 C. B. 400, 409. As an illustration of this, the known insolvency of the maker constitutes no excuse.

(b) In *Tindal v. Brown*, 1 T. R. 167, 169, *Ashhurst*, J. said: "Notice means something more than knowledge." In *Esdaile v. Sowerby*, 11 East, 114. Lord *Ellenborough* said: "As to knowledge of the dishonor by the person to be charged on the bill being equivalent to due notice of it, given to him by the holder, the case of *Nicholson v. Gouthit*, 2 H. Bl. 610, is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it." In *Burgh v. Legge*, 5 M. & W. 418, 420, *Parke*, B. said: "There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying in its terms intelligence of the presentment, dishonor, and parties to be held liable in consequence. That is the true meaning of the word 'notice,' when used in declarations of this kind, and the mere knowledge of a party is not enough." *Alderson*, B. said: "I think we ought to construe the word 'notice' as meaning a notification of the fact of the bill having been dishonored after the presentment took place; and it is far better for the advancement of justice to adhere to this simple meaning, than to confound notice with knowledge." In *Miers v. Brown*, 11 M. & W. 372, 374, *Alderson*, B. said: "Knowledge of the dishonor, obtained from a communication by the holder of the bill, amounts to notice." See also the remarks of *Cresswell*, J., in *Caunt v. Thompson*, 7 C. B. 400, 410. In that case the holder presented the bill at the house of the acceptor, and the defendant, the drawer, to whom the bill was shown, said that he was the executor of the acceptor, and requested the holder to let it stand over a few days. It was objected that this did not constitute due notice to the drawer, because knowledge was not notice; but it was held to be sufficient. During the argument, it was asked by counsel whether notice was necessary where the drawer married the acceptor, between acceptance and maturity. *Williams*, J. replied by asking how it would be if the holder employed the drawer to present. In *Agan v. M'Manus*, 11 Johns. 180, the holder left the note in the indorser's hands, the indorser being his attorney, to compel payment from the maker. A question arose as to whether this constituted notice; but it appeared that the holder had before called upon the maker for payment, and had not given any notice of the refusal. *Thompson*, C. J. said: "It is evident, therefore, that, when the note was left with the defendant, it was not intended as a notice of non-payment, or a demand of payment from the indorser; for it was left, as is stated, for the purpose of obtaining the money from the maker."

excuse arising from want of funds may be an exception, but we have seen that this depends upon a different and entirely distinct principle.(c) It has also been frequently said, that notice to one partner was notice to the firm, because the knowledge of one was the knowledge of all. But we should prefer to consider this rule, so far as relates to the law of notice of dishonor of negotiable paper, as dependent, not upon knowledge, but upon the identity of interest between each partner and the partnership, making each member, so far as relates to notice, in fact the firm.

It may likewise be laid down as a rule, equally universal with the preceding one, that absence of injury from want of notice is now no excuse for neglect,(d) and evidence to prove want of injury is inadmissible.(e)

See the remarks of *Duncan, J.*, *Juniata Bank v. Hale*, 16 S. & R. 157, 160. In *Cory v. Scott*, 3 B. & Ald. 619, 622, *Abbott, C. J.*, referring to *Walwyn v. St. Quintin*, 1 Bos. & P. 652, said: "That decision which substituted knowledge for notice I have always regretted. . . . As I have always thought that it would have been better never to have considered knowledge as equivalent to notice, I cannot consent to carry the law one step further."

(c) *Supra*, p. 545, *et seq.*

(d) *Buller, J.*, in *Bickerdike v. Bollman* 1 T. R. 405, said: "On the second trial of the cause of *Tindal v. Brown*, 1 T. R. 167, before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that it had not appeared from the evidence that any injury had arisen to the party from want of notice. In consequence of which, upon the subsequent trial, I told the jury that, when a bill was accepted, it was *prima facie* evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce." In *Hill v. Martin*, 12 Mart. La. 177, *Porter, J.* said: "The plaintiffs read from Chitty, p. 151, to show that, when the indorser was not injured by want of notice, the laches to give it was cured." This rule is stated in a note to the edition of 1809, but it is not law." See the remarks of *Abbott, C. J.*, in *Hill v. Heap*, Dow. & R., N. P. 57.

(e) In *Dennis v. Morrice*, 3 Esp. 158, *Gibbs*, counsel for the plaintiff, said: "The principle upon which notice has been held necessary to be given to the drawer is, that he may receive a prejudice from the want of notice, as he might take his effects out of the hands of the drawee; if, therefore, I can show that no prejudice whatever arose to the drawer from the want of notice, that shall dispense with the necessity of it. If the plaintiff is not allowed to go into this kind of evidence, the drawer must hold the money received from the payee as the consideration of the bill, without the possibility of its ever being recovered." But Lord *Kenyon* said: "I cannot hold the law to be so. The only case in which notice is dispensed with is where there are no effects of the drawer in the drawee's hands. This would be extending the rule still further than ever has been done, and opening new sources of litigation, in investigating whether in fact the drawer did receive a prejudice from the want of notice or not." The evidence was rejected, and the plaintiff nonsuited.

As an illustration of the stringency of the rule, the holder in one case attempted to excuse a failure to give notice of non-acceptance to an indorser, on the ground that, two months before the bill should have been presented for acceptance, the drawer had become insolvent, all his effects had been attached, and he himself had absconded; but notice was held necessary.(f)

From an early case, it would appear, as we have intimated, that originally the drawer was held, unless he could prove actual injury by neglect or laches in giving notice.(g) It may be supposed that after a while the mere lapse of time was considered *prima facie* proof of injury, and that finally, owing to the difficulty of proof in most instances, the rule was laid down strictly, that notice is necessary whenever there is a possibility of injury;(h) and as there is scarcely any case in which it may not be possible for injury to be received in some way from want of notice, we may say that a failure to give it in the proper manner is so entirely conclusive evidence of injury, that absence of injury is entirely immaterial.

However strong an influence the matter of injury may have had in the gradual formation of the law with respect to notice, we think that now there is no connection between them, and that this, as a reason, has entirely disappeared. The only exception to be urged against this conclusion is the suggestion that has been made,(i) that a party who has no reason-

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(f) *May v. Coffin*, 4 Mass. 341. In this case the counsel said: "All his property was gone from him, and that even his body was not within the reach of legal process. Of what conceivable use, then, could notice have been? Certainly not to enable the defendant to secure himself." So notice to an indorser was held necessary in *Nash v. Harrington*, 2 Aikens, 9, where the maker, an insolvent, was in prison for debt at the maturity of the note, and had no attachable property.

(g) *Meggadow v. Holt*, 12 Mod. 15, decided in A. D. 1691, where the court said: "The law of merchants in this case is, that if he who has such a bill lapse his time, and do not protest, or make his request, if any accident happen by this neglect, in prejudice to the drawer, he hath lost his remedy against him; but if such a thing had happened, it ought to have come of the other side, and not being so, we must judge on the declaration." Judgment was given for the plaintiff. This case is also reported *Mogadara v. Holt*, in 1 Show. 294.

(h) *Marshall, C. J.*, in *French v. Bank of Columbia*, 4 Cranch, 141, 154, said: "The law requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury, which may result from the laches of the holder of the bill."

(i) *Supra*, p. 551, note c.

able grounds to expect that his bill will be honored, may still object to what would otherwise be a perfect excuse for failure to give due notice, by proving actual injury. But this we have doubted, because a party can have no right to complain that he has been injured by the direct consequence of his own wrongful act. We have also expressed an opinion that the doctrine relating to the excuse of want of funds proceeds upon other principles or reasons than that of injury,<sup>(j)</sup> although this has been frequently given as the reason.<sup>(k)</sup>

With respect to the pleading as regards notice it may be observed, that objection to the want of it should be taken before verdict, otherwise it will be taken for granted that due notice has been given.<sup>(l)</sup>

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<sup>(j)</sup> *Supra*, p. 551.

<sup>(k)</sup> In *Mechanics' Bank v. Griswold*, 7 Wend. 165, 168, *Nelson, J.* said: "Upon the maxim that, when the reason for the rule of law does not exist, it ought not to be applied, it has frequently been decided that, in cases where the non-payment by the maker, and failure of notice to the indorser, cannot possibly operate to the injury of the indorser, the omission will not discharge him." The judge then goes on to explain the various excuses for want of notice on this ground. This same proposition is laid down more emphatically by *Cowen, J.*, in *Commercial Bank v. Hughes*, 17 Wend. 94, 97, who said: "Formerly it was necessary, in order to complete the defence, that the drawer should prove damage to himself arising from the holder's laches; but now it will be presumed. Yet the presumption is not conclusive. If it appear in truth that no damage could arise, the necessity for presentment or notice does not exist. . . . We certainly have a very strong current of authority for saying that, where the indorser or drawer has plainly suffered nothing, and can sustain no mischief for want of demand and notice, none need be made or given; and it accords with the true and only reason why such demand and notice are called for. The question seems merely to be one of evidence. The drawer or indorser is presumed to have been injured by the omission, until the plaintiff, by proof on his side, remove all chance of damage." It would seem, from the facts of the case, that the judge was inclined to the opinion that, where the drawer of a bill had himself received the amount, as by getting it discounted, he would not be entitled to notice. There is a *dictum* of *Thompson, C. J.*, in *Agan v. M'Manus*, 11 Johns. 180, 181, somewhat to the same effect. But this is opposed to the case of *Dennis v. Morrice*, 3 Esp. 158, *supra*, p. 630, note *e*, and cannot, we think, be supported. We should also dissent from the principle as laid down by Mr. Justice *Cowen*.

<sup>(l)</sup> *Cornwall v. Gould*, 4 Pick. 444.

## CHAPTER XIV.

## OF PROTEST AND OF RE-EXCHANGE.

## SECTION I.

## OF PROTEST.

WHEN negotiable paper is protested, the protest is made before a notary public,<sup>(m)</sup> if there be such an officer within reach. If not, it is said that it may be made before any respectable inhabitant of the place, before two proper witnesses.<sup>(n)</sup>

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(m) The origin of the term notary is traced as far back as the ancient Roman Republic, when the term *notarius* was applied to a person who was occupied in taking down the words of a speaker in notes or writing (*notæ*). The *notarii* were short-hand writers, and that they used symbols of abbreviation is clear from many passages of ancient writers; the persons employed in this service were often slaves. But the functions of the modern notary public were doubtless derived from a class of public officers, mentioned under the later Roman law by the name of *tabelliones*, whose business it was to draw up contracts, wills, and other legal instruments to be presented to the courts of law, or other authorities of state. To make these documents legal evidence for judicial purposes, it was at length found necessary to require by law that they should be attested by witnesses, and that the notary (*tabellio*) should be present in person at the drawing up of the document, and also should affix his signature and the date of the execution. Under the Frankish kings, officers exercising similar functions were called *cancellarii* and *notarii*. In England, notaries appear to have been known as public officers before the Norman conquest. Spelman cites some charters of Edward the Confessor as being executed for the king's chancellor by notaries (Gloss., Tit. *Notarius*). It is certain that they were employed at a very early period to attest and authenticate instruments of moment and solemnity. They are mentioned in the statute of 27 Edw. III. c. 1. It is generally supposed that the power of admitting notaries to practice was vested in the Archbishop of Canterbury by 25 Hen. VIII. c. 21, § 4.

(n) Bayley on Bills, c. 7, § 2; Chitty on Bills, p. 333. In *Burke v. McKay*, 2 How. 66, *Story, J.* said that, in many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries, and even by merchants. See also *Read v. Bank of Kentucky*, 1 T. B. Mon. 91, in which case it was held that it was no objection that a note held by a bank was protested, in the absence of a notary, by a private person who was a stockholder in the bank, it being sufficient that the witnesses were disinterested. It is not necessary for the witnesses in such case to subscribe their names. It was further held in this case, that a private individual has no right to charge fees for protesting. It is held, however, that a no-

A notary public is a public officer, recognized as such all over the commercial world. The instrument of appointment now in use in England declares that full faith be given, "as well in judgment as thereout," to the instruments by him to be made; and language of the same meaning is sometimes used in commissions to notaries in the United States.

Very great importance has always been attached to the attestation of a notary public. (o) He is considered as receiving and noting the evidence or statements brought before him; "to protest," signifying literally "to testify before." He is regularly appointed and commissioned, and has his seal, which must be affixed to his official documents. (p)

tary who is a stockholder of a bank cannot make an admissible protest of a note for the bank. *Herkimer County Bank v. Cox*, 21 Wend. 119; *Bank v. Porter*, 2 Watts, 141. Mr. Brooke, in his treatise on the office and practice of a notary of England, says it does not appear that there is an usage, in the case of a protest of a foreign bill by a private inhabitant of the place, to require any witnesses to such protest, p. 103. In case of inland bills, it is required by the statute 9 & 10 William III. c. 17, that the protest by a private person be made in the presence of two or more credible witnesses. See also stat. 3 & 4 Anne, c. 9, §§ 6, 9. It is provided by the commercial code of France that all protests for non-acceptance or non-payment shall be made by two notaries, or by one notary and two witnesses, or by a bailiff and two witnesses. Art. 173.

(o) It is stated in Burn's Ecclesiastical Law, 9th ed., Vol. III. p. 11, that "one notary public is sufficient for the exemplification of any act; no matter requiring more than one notary to attest it"; and the rule of the canon law as to the credit of a notary is *unus notarius æqui pollet duobus testibus*. Mr. Brooke thinks it not improbable that Massinger, the dramatist, was satirically alluding to some such rule, when, in the drama of the "New Way to Pay Old Debts," written before 1633, Sir Giles Overreach declares, —

" Besides, I know thou art  
A public notary, and such stand in law  
For a dozen witnesses."

Brooke's Notary, chap. 1; Burn's Ecclesiastical Law, Vol. III., Tit. *Not. Pub.*

(p) It is everywhere held, that it is a sufficient authentication of a protest made in a foreign country or state, that it purports to be, and apparently is, under the seal of a notary. *Anonymous*, 12 Mod. 345; *Chitty on Bills*, 655; *Townsley v. Sumrall*, 2 Pet. 170; *Halliday v. McDougall*, 20 Wend. 81; *Carter v. Burley*, 9 N. H. 558; *Crowley v. Barry*, 4 Gill, 194; *Bank of Rochester v. Gray*, 2 Hill, 227; *Wells v. Whitehead*, 15 Wend. 527; *Kirksey v. Bates*, 7 Port. Ala. 529; *Fleming v. M'Clure*, 1 Brev. 428; *Bryden v. Taylor*, 2 Harris & J. 396; *Chase v. Taylor*, 4 id. 54; *Nicholls v. Webb*, 8 Wheat. 326; *Las Caygas v. Larionda*, 4 Mart. La. 283; *Ross v. Bedell*, 5 Duer, 462. But if the protest is not made by a notary, or is not under seal, there must be evidence of the official character of the officer, and of the laws of the state or country where it was made, showing that it was duly made according to the laws there existing. Per *Parker, C. J.*, in *Carter v. Burley*, 9 N. H. 558, 568; *Chanoine v. Fowler*, 3 Wend. 173; *Bank of Rochester v. Gray*, 2 Hill, 227. And of course where a seal to the protest is required by the law of the State where it is made, a protest without the seal will

In the case of foreign bills, protested in a country other than that in which the suit is brought, full faith and credit are given to the instrument of protest; and the original, or a duly certified copy, are admissible in evidence of the acts therein stated, so far as these acts are within the scope of a notary's official duty.<sup>(q)</sup> In the case of inland bills, and even foreign bills which are protested in the country where suit is brought, the protest is not admissible in evidence,<sup>(r)</sup> unless the notary has deceased since the protest was made.<sup>(s)</sup> In many of our States, however, this whole subject is regulated by statute.<sup>(t)</sup>

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not be received in evidence as such. *Tickner v. Roberts*, 11 La. 14. It was held, however, in *Lambeth v. Caldwell*, 1 Rob. La. 61, that the want of a seal to the certificate of a notary was no objection to its admission in evidence as proof of notice to the indorsers of a note upon which the action was brought. It was said in that case, that there was no law requiring a notary to furnish himself with a seal. So also, in an early case in Kentucky, it was held that a notary's certificate of a protest was sufficient, under the statutes of that State, without a seal; and the court seemed to be of the opinion that such a seal was not required by the law merchant. *Bank of Kentucky v. Pursley*, 3 T. B. Mon. 238. As to the sufficiency of a notarial seal, it is held that one stamped upon paper of sufficient tenacity to retain the impression is all that is required by the strictest rules of the common law. *Ross v. Bedell*, 5 Duer, 462; *Carter v. Burley*, 9 N. H. 558; *Bank of Manchester v. Slason*, 13 Vt. 334; *Connolly v. Goodwin*, 5 Calif. 220. But see *Bank of Rochester v. Gray*, 2 Hill, 227. See *Kirksey v. Bates*, 7 Port. Ala. 529, as to the requisitions of notarial seal under the statute of the State. But a scrawl is not a sufficient authentication, except in States where a scrawl or "*Locus sigilli*" is generally held to be the equivalent to a seal. *Semble per Parker, C. J.*, in *Carter v. Burley*, 9 N. H. 588, *supra*, p. 634, note *p*.

(q) *Townsley v. Sumrall*, 2 Pet. 170, 178; *Bryden v. Taylor*, 2 Harris & J. 396.

(r) *Nicholls v. Webb*, 8 Wheat. 326, *dictum*; *Chesmer v. Noyes*, 4 Camp. 129.

(s) *Nicholls v. Webb*, 8 Wheat. 326.

(t) This is a matter of statutory regulation in many of the States. In New Hampshire it is provided that "the protest of any bill of exchange, note, or order, duly certified by any notary public, under his hand and official seal, shall be evidence of the facts stated in such protest, and of the notice given to the drawer or drawers." Comp. Stats. 1853, p. 70, § 3. This statute is held to apply to protests of both foreign and domestic bills, and whether made by a notary resident in the State or elsewhere. The protest is only *prima facie* evidence of the facts stated, including the notice. Where the notary certified that he duly gave notice to the indorsers, without reciting what was done to give notice, the notice must be regarded *prima facie* to have been personal and actually given; and the insertion of the word *duly* does not vitiate the protest, on the ground that it is a conclusion of law. These points are decided in the late case of *Rushworth v. Moore*, 36 N. H. 188. The same points in regard to notice were decided in the same way in a recent case in Maine, *Ticonic Bank v. Stackpole*, 41 Maine, 321, in which State the same statutory provision existed until recently, it being omitted in the late revision of 1857. See R. S. of 1840, c. 44, § 12. Under that statute it was held that the certificate was not conclusive evidence of the facts stated as to the giving of notice. *Bradley v. Davis*, 26 Maine, 45. See *Loud v. Merrill*, 45 Maine, 516, 521. By the Revised Statutes of Maine of 1857, p. 273, § 4, it is provided in general terms



### But while the protests or certificates of protest of a notary

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that all copies or certificates granted by a notary, under his hand and notarial seal, shall be received as legal evidence of such transactions and of all the facts therein contained.

In Connecticut, it is provided that protests of inland bills of exchange, and promissory notes protested without the State, shall be admitted as *prima facie* evidence of the facts therein stated. Compilation of Stats. 1854. p. 93, § 128.

In New York, Wisconsin, and California, it is provided that the certificate of a notary, under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof, specifying the mode of giving such notice, and the reputed place of residence of the party to whom the same was given, and the post-office nearest thereto, shall be presumptive evidence of the facts contained in such certificate. But in New York it is provided that this presumption shall not apply to any case in which the defendant shall annex to his plea an affidavit denying the fact of having received notice of non-acceptance or non-payment of such bill or note; nor to any case of a protest of an inland bill of exchange or of a promissory note made by any notary of that State, except in case of the death, insanity, or absence of the notary, so that his personal attendance or his testimony cannot be procured.

In New York and Wisconsin, it is further provided that any note or memorandum, made and signed by the notary at the foot of the protest or in a record, shall in the same way be presumptive evidence of notice sent; and in California it is provided that a certificate of a notary public, drawn from his record, stating the protest and the facts therein contained, shall be evidence of the facts in like manner as the original protest. See R. S. of N. Y., 4th ed., Vol. II. pp. 470, 471, §§ 33-36; R. S. of Wis. 1858, c. 12, §§ 4, 6; Woods's Dig. of the Laws of Cal., 1858, p. 554, Art. 2848. Under these statutes it is not necessary to state the form of the notice given, *McFarland v. Pico*, 8 Calif. 626; nor the hour of presentment, *Cayuga Co. Bank v. Hunt*, 2 Hill, 635. The statute of New York, making notarial certificates evidence, applies only to protests made within the State by notaries of that State. *Kirtland v. Wanzer*, 2 Duer, 278; *Bank of Rochester v. Gray*, 2 Hill, 227; *dictum* of Harris, J. to the contrary, in *Bank of Vergennes v. Cameron*, 7 Barb. 143. And the provision making the memorandum evidence of notice does not extend to a statement of the presentment and demand of a note or bill. *Otsego Co. Bank v. Warren*, 18 Barb. 290.

In Pennsylvania, by an act passed 14th December, 1854, the protests of all notaries public, certified, according to law, under their hands and seals of office, in respect to the dishonor of all bills of exchange and promissory notes, and notice thereof, may be received and read in evidence as proof of the facts therein stated; and in Ohio the instrument of protest of any notary public appointed and qualified under the laws of that State, or the laws of any other State or Territory of the United States, accompanying any bill of exchange or promissory note which has been protested for non-acceptance or non-payment by such notary, shall be held and received as *prima facie* evidence of the facts therein certified. But in both Pennsylvania and Ohio it is provided that any party may be permitted to contradict by other evidence any such certificate. See Purdon's Dig. 1857, p. 1138; R. S. of Ohio, 1854, c. 75, § 6.

The notarial certificate of protest is evidence of the facts therein set forth, although the notary, when examined, has no recollection of them; for the statute makes the certificate sufficient evidence of the facts therein certified, in the absence of contradictory proof. *Sherer v. Easton Bank*, 33 Penn. State, 134.

public are admitted in evidence, and this evidence is entitled to

In Maryland, Virginia, North Carolina, Tennessee, and Iowa, it is provided, in substance, that a protest duly made by a notary public of a bill of exchange, whether foreign or inland, for non-acceptance or non-payment, or of a promissory note for non-payment, shall be *prima facie* evidence of such non-payment or non-acceptance, and that presentment was made and notice given in the manner stated. Dorsey's Laws of Md., Vol. II. p. 1257, c. 253, Act of 1837; Graham v. Sangston, 1 Md. 59; Code of Va. 1849, c. 144, § 7; R. Code of N. Car. 1854, c. 13, § 9; Code of Tenn. 1858, §§ 1799, 1800; Code of Iowa, 1851, § 2414. In Tennessee, it is further provided, that, after the notary's death, his record of notice of dishonor shall be *prima facie* evidence of the fact. Code, *supra*, § 1801.

The design of the statute of Maryland, as to the mode of proof of demand and notice, was to place foreign and inland bills upon the same footing, and, as regarded inland bills and notes, to dispense with the necessity of adducing oral proof of demand and notice, by substituting therefor the protest of the notary; and the protest is sufficient in form, if it states in substance a demand and notice. Per Archer, C. J., in Barry v. Crowley, 4 Gill, 194.

In Michigan, notaries public are empowered to demand acceptance of foreign and inland bills of exchange and promissory notes, and to protest the same; and his certificate, under his hand and seal, of the official acts done by him is made presumptive evidence of the facts contained in it; but such certificate is not notice of non-acceptance or non-payment in any case in which a defendant shall annex to his plea an affidavit denying the fact of having received such notice. Compiled Laws of 1857, Vol. I. Chap. X. §§ 112, 113.

In Minnesota, it is made the duty of a notary, in protesting bills and notes, to give notice of protest, and to certify, in the instrument of protest, the time and manner of the service of such notice; and the protest of any notary public, appointed under the laws of that State, or the laws of any other State or Territory of the United States, is made *prima facie* evidence of the facts therein certified, provided that any party may contradict by other evidence such certificate. The record of the protest, or a certified copy of the record, is made evidence in the same way. Compiled Statutes of 1859, p. 134, §§ 5, 6.

In Indiana, the official certificate of a notary public, attested by his seal, are presumptive evidence of the facts therein stated, in cases where, by law, he is authorized to certify such facts; and he is authorized to do all such acts which, by common law and the custom of merchants, a notary is authorized to do. R. S. 1852, Vol. I. p. 378, c. 76, §§ 5, 6. Another statute in similar terms declares that the certificates or instruments purporting to be the official act of a notary public of that State, or of any other State or Territory of the United States, and purporting to be under the seal and signature of such notary, shall be received as presumptive evidence of the official character of such instrument, and of the facts therein set forth. Id., Vol. II. p. 91, § 281. Under these statutes it is held that a protest of a promissory note, with a certificate of notice made by a notary of another State, is admissible evidence, without proof of its execution. Shanklin v. Cooper, 8 Blackf. 41. This decision was affirmed in Turner v. Rogers, 8 Ind. 139, where it was held, that, so far as presentment, demand of payment, and the transmitting of notice are concerned, the protest of a promissory note in such case is evidence; and the court say, that the universal practice of the commercial community indicates the propriety of this rule. So in case of a bill of exchange. Dickerson v. Turner, 12 Ind. 223.

In South Carolina, it is provided that, where the notary who has made protest of any

much weight, it is, however, open to rebutter. The truth of the

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inland bill or promissory note is dead, or resides out of the district in which such note or bill is sued, his protest shall be received as sufficient evidence of notice in any action against any parties to the bill or note. Statutes at Large, Vol. VI. p. 182.

In Georgia, certificate and protest by notaries public, under their hand and seal, for the non-acceptance of any bill of exchange, or for the non-payment thereof, or of any note, are *prima facie* evidence of the facts therein stated; provided that either party may have the benefit of the testimony of such notary if necessary, and provided that either a copy or the original of such protest is filed in court. Cobb's New Dig. 1851, Vol. I. p. 273, § 27.

In Kentucky, it is declared that the notarial protest, under seal, of the non-acceptance or non-payment of a bill, shall be evidence of its dishonor; but the protest may be disproved. R. S. 1852, p. 194, § 12.

In Arkansas, it is declared that a protest made by a notary public, under his hand and seal of office, shall be allowed as evidence of the facts therein contained. Dig. of Stats. 1858, c. 25, § 12. Under this statute it is held that the certificate of a notary who protested a bill, that he forwarded due notice of protest, though under his notarial seal, is no evidence of the fact. Real Estate Bank v. Bizzell, 4 Ark. 189. There must be actual proof of notice, according to the law merchant. Sullivan v. Deadman, 19 Ark. 484.

In Missouri, a notarial protest is evidence of a demand and refusal to pay a bill of exchange, or negotiable promissory note, at the time and in the manner stated in such protest. R. S. 1855, Vol. I. p. 298, c. 18, § 20.

In Illinois, it is made the duty of notaries public to protest bills and notes, and to give notice of the dishonor of the same; and to keep a correct record of all such notices, and of the time and manner in which the same have been served, of the names of the persons to whom directed, and of the description and amount of the instrument protested, which record is competent evidence to prove such notice. Compiled Statutes of 1858, Vol. II. p. 795, §§ 4, 5.

In New Jersey, notaries are required, upon protesting any foreign or inland bill or promissory note, to record the time and place of the demand, and upon whom it was made, with a copy of the notice sent, how it was served, and when, and if sent, in what manner, to whom, and where, and when put into the post-office. Upon the death or absence of the notary, this record, or a certified copy thereof, is competent evidence of the matters contained in such record. Nixon's Dig. 1855, p. 668. §§ 6, 7, 8.

In Mississippi, it is the duty of notaries public to make a record of all their proceedings in relation to the protest of any bill or note, of whom, when, and where the demand was made, and of the notice given, and in what manner; and such record, or a copy of the same, verified by oath, is competent evidence of the facts therein stated touching the dishonor of such bill or note. Rev. Code, 1857, pp. 413, 519.

In Louisiana, it is the duty of notaries to keep a record of protests of bills and notes, of the notices given by them, the date of the notices, and the manner in which they were served or forwarded, which record is legal proof of the notices. Notaries are also authorized to make mention of the manner and circumstances of the demand in their protests, and by certificates added thereto to state the manner in which any notices of protest were served or forwarded; and, whenever they shall have so done, a certified copy of such protest and certificate is evidence of all matters therein stated. R. S. 1856, p. 45, §§ 8, 9.

In Texas, the holders of any bill of exchange or promissory note may fix the liability of any drawer or indorser of the bill or indorser of the note, without any protest or

certificate may be disproved by evidence.(u) And the certificate is not itself even evidence of collateral facts. Thus a statement that the drawer refused to accept because he had no funds, is no evidence whatever of want of funds.(v) And even where the statute of the State made the certificate of protest evidence of all the matters it contains, and such a certificate stated that the drawee expressed his willingness to pay the bill in bank-notes of a particular description, it was held that this was no evidence of such acknowledgment.(w)

So a recital, in a foreign notarial certificate, that the notary had served the protest on the acceptor, in his own name, and as agent of the drawer, is no evidence of the agency in an action against the drawer.(x)

It has, however, been held, not only that the notarial certificate is *prima facie* evidence that the demand was duly made of the principal party, where it stated that the demand was made; but also, where it stated that the demand was made of an "attorney in fact," or of a clerk of the acceptor or maker, that it was *prima facie* evidence that the attorney or agent was properly authorized to receive the demand and refuse payment.(y)

If paper be made, or drawn, or accepted, or indorsed in one

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notice, by instituting a suit against the acceptor of the bill or maker of the note at the next term of the District Court. And so in case of the non-acceptance. But instead of this, protest may be made of the bill or note; upon which it is the duty of the notary to give notice thereof, and to note in his protest and notarial record on whom, when, and how the notice was served; and such protest, or a copy of the record, under his hand and seal, is evidence of the facts therein set forth. Oldham and White's Dig. 1859, p. 52, Arts. 94, 96, 97, 98. The provision which dispenses with protest and notice also dispenses with a demand. *Sydnor v. Gascoigne*, 11 Texas, 449.

(u) The truth of the statements in the certificates may be disproved. *Gardner v. Bank of Tennessee*, 1 Swan, 420; *Union Bank v. Fowlkes*, 2 Sneed, 555. In *Ricketts v. Pendleton*, 14 Md. 320, it was declared that, although the certificate of the notary is made, by the act of 1837, *prima facie* evidence, yet, like all other evidence, it must be submitted to the jury, and passed upon by them. Such, no doubt, would be the ruling of the courts in the United States generally, and we should say universally.

(v) *Dumont v. Pope*, 7 Blackf. 367.

(w) *Maccoun v. Atchafalaya Bank*, 13 La. 342.

(x) *Coleman v. Smith*, 26 Penn. State, 255.

(y) *Phillips v. Poindexter*, 18 Ala. 579; *Stainback v. Bank of Virginia*, 11 Gratt 260. And so in *Whaley v. Houston*, 12 La. Ann. 585, a notary having certified that he "had presented the draft to a clerk of the drawees at their office, said drawees not being in, and demanded acceptance thereof, and was answered that the same would not be accepted" it was held that this was a sufficient presentment, the defendants being merchants having a counting-room in New Orleans.

country, and be payable in another, the question whether demand and protest must be made, and notice given according to the law of the place where the paper is payable, or according to that where the signatures are made, has been much discussed, and may not now be certain. We think the true rule is this. It being determined at what time the paper is mature and payable, then the protest should be made by the law of the place *where* the paper is payable, and therefore *where* the protest is to be made. And the manner of making the demand and protest must be governed by the same law. Then as to the notice, this should be given by the notary making the protest, and may be given by him according to the law which governs his proceedings, or the law of his own place, or the place where the paper is payable. If, however, distant parties (who may receive their notice from the notary) transmit notice according to the law of the place of their residence, in which they put their names to the paper, this notice would be sufficient. And if the notary himself, knowing the law of the foreign country to which he sends notice to persons who there become parties to the paper, should conform to that law, we should say that the notice would be sufficient.(z)

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(z) *Carter v. Union Bank*, 7 Humph. 548; *Bank of Rochester v. Gray*, 2 Hill, 227; *Ellis v. Commercial Bank of Natchez*, 7 How. Miss. 294; *Carter v. Burley*, 9 N. H. 558; *Onondaga Co. Bank v. Bates*, 3 Hill, 53; *Grafton Bank v. Moore*, 14 N. H. 142; *Ross v. Bedell*, 5 Duer, 462; *Shanklin v. Cooper*, 8 Blackf. 41; *Turner v. Rogers*, 8 Ind. 139; *Chitty on Bills*, 333. "By the common law," says Story, "the protest is to be made at the time, in the manner, and by the persons prescribed, in the place where the bill is payable. But as to the necessity of making a demand and protest, and the circumstances under which notice may be required or dispensed with, these are incidents of the original contract, which are governed by the law of the place where the bill is drawn. They constitute implied conditions, upon which the liability of the drawer is to attach, according to the *lex loci contractus*." *Conflict of Laws*, § 360. A recent English writer upon the conflict of laws, Mr. Westlake, says: "I cannot altogether agree with this doctrine. There is, no doubt, a sound distinction between the events on the occurrence of which the drawer or indorser undertakes to pay, and the notice given to him of their occurrence; but the making a demand and protest, when necessary by the law of the place of payment, should, I think, rank among the former no less than the dishonor itself; since, if these formalities be omitted, the drawer may be impeded in the exercise of his remedies against the acceptor. Besides, if the necessity of demand and protest were determined by different laws for the drawer and the several indorsers, it might easily happen that one of those parties was made liable, without being able to recover over from a previous one" The same author thinks that Story has given elsewhere a more correct statement of the rule, — in his *Conflict of Laws*, § 260. "But the sufficiency of the notice after completion of the protest, if

We have said that the demand may perhaps be made by a duly authorized clerk of the notary. But the usual way is for the notary to present the bill himself. And the authorities indicate that he must do so to make his certificate valid.(a)

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any, may well be tested by the law of the place of drawing or indorsing, as a condition implied in the contract, and which a regard for the contractor's own security does not refer to any other law." Westlake on Private International Law, Art. 225. The latter point, that the sufficiency of notice is governed by the law of the place of drawing or indorsing, is expressly held in the case of *Cook v. Litchfield*, 5 Seld. 279, 290. *Contra*, see *Rothschild v. Currie*, 1 Q. B. 43, which was an action on the dishonor of a bill drawn in England on a French house, and made payable in France, where it was protested. The defendant had indorsed the bill in England; and it was held that it was sufficient that he had received such notice of the dishonor and protest as was required by the law of France. See *Allen v. Kemble*, 6 Moore, P. C. 314. *Shanklin v. Cooper*, 8 Blackf. 41, is in accordance with *Rothschild v. Currie*.

(a) The authorities generally indicate that the protest must be made by the notary himself, and not by his clerk or agent. *Leftley v. Mills*, 4 T. R. 170; *Bayley on Bills*, 210; *Chitty on Bills*, 459; *Sacridier v. Brown*, 3 McLean, 481; *Chenoweth v. Chamberlin*, 6 B. Mon. 60; *Bank of Kentucky v. Garey*, id. 626; *Carter v. Union Bank*, 7 Humph. 548; *Carmichael v. Bank of Pennsylvania*, 4 How. Miss. 567; *State Bank of Indiana v. Hayes*, 3 Ind. 400; *Onondaga Co. Bank v. Bates*, 3 Hill, 53. In the latter case the notarial certificate of protest stated that the officer *caused* the note to be presented, &c. *Nelson, C. J.*, delivering the opinion of the court, said, that the fair inference to be drawn from the language of the certificate was, that the note was presented by the clerk of the notary, or some third person; and he held that the duties of a notary in presenting notes and bills could not be thus delegated, and that the certificate was insufficient. This decision was affirmed in *Hunt v. Maybee*, 3 Seld. 266, and also in *Warnick v. Crane*, 4 Denio, 460. See also *Stewart v. Allison*, 6 S. & R. 324; *Ellis v. Commercial Bank of Natchez*, 7 How. Miss. 294; *Sheldon v. Benham*, 4 Hill, 129. Where it was in proof that the clerk of the notary made the demand, and the protest stated that the notary himself made it, the protest was held inadmissible, because false. In this case the clerk demanded, and in his deposition declared that he made the demand and the notary made the protest. Held no sufficient evidence of a legal demand. *Smith v. Gibbs*, 2 Smedes & M. 479. In *Nelson v. Fotterall*, 7 Leigh, 179, this question was examined at length, and the opinion expressed that a demand by a clerk of a notary is regular. See *Atwell v. Grant*, 11 Md. 101. Mr. Chitty remarks, that the observation of *Buller, J.*, in *Leftley v. Mills*, 4 T. R. 170, that the notary must make the demand in person, was a mere *dictum*, as far as relates to the custom of merchants or to foreign bills, for the case arose upon an inland bill, under the statute 9 & 10 Wm. III., allowing such protest; and he further remarks, that the practice of notaries in London and Liverpool appears to be in direct opposition to the supposed necessity for the notary himself demanding payment. A correspondence took place upon this subject, which is stated in Mr. Chitty's work on Bills, p. 459. That it is sufficient for the clerk of the notary to make the presentment is implied in *Poole v. Dicas*, 1 Bing. N. C. 649, 1 Scott, 600, in the Court of Common Pleas, although the point was not directly before the court. See *Sutton v. Gregory*, Peake, Add. Cas. 150, where evidence of an entry in a notary's book by a clerk since deceased was admitted to prove the presentment of the bill. In *Wilkins v. Jadis*, 2 B. & Ad. 188; in *Garnett v. Woodcock*, 1 Stark. N. P. 475, 6 Maule & S. 44; in *Triggs v. Newnham*, 1 Car. & P. 631, 10 Moore, 249; and in



Protest is *necessary*, by the universal law merchant, in the case of foreign bills. (b) It has, indeed, been distinctly asserted that it is the only legal evidence of notice in case of the dishonor of a foreign bill. (c) In this respect, our States would undoubtedly be considered as foreign to each other. (d) And

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Philpott v. Bryant, 3 Car. & P. 244, the plaintiff recovered, on the evidence of the presentment by the clerks of the notaries, this point not being raised. Mr. Brooke declares his knowledge of the custom of presentment by notaries' clerks for more than forty years, and he gives an extended correspondence with notaries and business men in England, which is to the same effect (Notary, Appendix No. 14). A distinction has been taken in some cases between a presentation by a clerk of a notary and one by his deputy; and where, as in New Orleans, the notary is authorized by law to employ a sworn deputy to assist him, a protest by the deputy is good, he being clothed by the appointment with an official character, in the same manner as a deputy under a sheriff. Bank of Kentucky v. Garey, 6 B. Mon. 626; Chenoweth v. Chamberlin, id. 60; Carter v. Union Bank, 7 Humph. 548. The notaries of New Orleans are authorized to appoint one or more deputies to assist them in making protests and delivering notices. R. S. 1856, p. 391, § 19. See also McClane v. Fitch, 4 B. Mon. 599. In Burke v. McKay, 2 How. 66, 72, Story, J. said, that "where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary, there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc*, he acts as a notary" See also Bailey v. Dozier, 6 How. 23, 29

(b) Although a protest is a mere matter of form, it has become, by the custom of merchants, a "part of the constitution" of a foreign bill. Per Holt, C. J., in Borough v. Perkins, 1 Salk. 131, 2 Ld. Raym. 992, 6 Mod. 80. See Gale v. Walsh, 5 T. R. 239; Orr v. Maginnis, 7 East, 359.

(c) Per Lord Mansfield, in Salomons v. Stavely, 3 Doug. 298. Noting for non-acceptance without protest is not sufficient. Rogers v. Stevens, 2 T. R. 713, though there be a subsequent protest for non-payment. Id., and Orr v. Maginnis, 7 East, 359. So indispensable is this formal notice of the non-acceptance or non-payment of a foreign bill of exchange, that no other evidence will supply the place of it, and no part of the facts requisite to the protest can be proved *aliunde*. Carter v. Union Bank, 7 Humph. 548; Gardner v. Bank of Tennessee, 1 Swan, 420; Union Bank v. Hyde, 6 Wheat. 572. But notice of dishonor may be proved independently of the notarial act. Bank at Decatur v. Hodges, 9 Ala. 631. And at common law, it is said that this is the only way of proving notice. Rives v. Parmley, 18 Ala. 256; Williams v. Putnam, 14 N. H. 540. In France, a protest is essential in case of the dishonor of inland as well as foreign bills, and of promissory notes. Trimbe v. Vignier, 1 Bing. N. C. 151, 4 Moore & S. 695; Chitty on Bills, 170. And so in Scotland and the commercial nations of Continental Europe a protest is indispensable upon the dishonor of inland bills and promissory notes, and in this respect they are not distinguished from foreign bills. Thomson on Bills, c. 6, § 2, pp. 442, 443, 2d ed; Pardes. Droit Comm., Tom. 2, Art. 479, 480; Story on Notes, § 298; Commercial Code of France. Art. 187

(d) This is now well established. Buckner v. Finley, 2 Pet. 586; Dickins v. Beal, 10 id. 572; Bank of U. S. v. Daniel, 12 id. 32, 54; Lonsdale v. Brown, 4 Wash. C. C. 86; Phoenix Bank v. Hussey, 12 Pick. 483; Brown v. Ferguson, 4 Leigh, 37; Rice v. Hogan, 8 Dana, 133; Halliday v. McDougall, 20 Wend. 81; Wells v. Whitehead, 15 Wend. 527; Carter v. Burley, 9 N. H. 558; Grafton Bank v. Moore, 14 N. H. 142; Duncan v. Course, 1 Const. R. 100; Aborn v. Bosworth, 1 R. I. 401; Ticonic Bank



this would be held, not only when the drawer and drawee were in different States, but when both resided in the same State, and the bill was payable in another.(e) In some of our States, protest of an inland bill is made necessary by statute, for the recovery of damages.(f) But otherwise protest of inland bills and promissory notes is not known to the law.(g) It is, how-

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*v. Stackpole*, 41 Maine, 302; *Robinson v. Johnson*, 1 Misso. 434. In accordance with these authorities is the doctrine of *Da Costa v. Cole*, Skin. 272, pl. 1, that a bill drawn in Ireland upon England is to be considered as a foreign bill. See also *Chaters v. Bell*, 4 Esp. 48; *Mahoney v. Ashlin*, 2 B. & Ad. 478. On the same principle it is considered necessary, and it is the custom, to protest bills drawn in Scotland or the Isle of Man upon England. *Brooke's Notary*, 177.

(e) The argument from convenience is as strong in one case as in the other. *Grafton Bank v. Moore*, 14 N. H. 142; *Freeman's Bank v. Perkins*, 18 Maine, 292.

(f) See *supra*, p. 635, note *t*.

(g) That a protest of an inland bill is not required by the law merchant, see *Union Bank v. Hyde*, 6 Wheat. 572; *Nicholls v. Webb*, 8 id. 326; *Young v. Bryan*, 6 id. 146; *Bailey v. Dozier*, 6 How. 23; *Smith v. Little*, 10 N. H. 532; *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576; *Bank of U. S. v. Leathers*, 10 B. Mon. 64; *Lawrence v. Ralston*, 3 Bibb, 102; *Murry v. Clayborn*, 2 id. 300; *Turner v. Greenwood*, 4 Eng. Ark. 44; *Hubbard v. Troy*, 2 Ired. 134; *McMurchey v. Robinson*, 10 Ohio, 496.

In England, a protest on inland bills of a certain description was allowed by statute of 9 & 10 William III c. 17, and 3 & 4 Anne, c. 9; and it was formerly supposed that a protest on such bills was necessary in order to enable the holder to recover interest, but it is now settled that it is not essential for that purpose. *Windle v. Andrews*, 2 B. & Ald. 696; 2 Starkie, 425; *Chitty on Bills*, 334.

In Mississippi, domestic bills drawn on and payable in that State, for the sum of \$20 or upwards, are required to be protested in like manner as foreign bills, but no damages shall accrue. R. C. 1857, p. 356. Protest of inland bills is expressly allowed by statute in several of the United States. *Supra*, p. 635, note *t*. That a protest of a promissory note is not necessary, though made in one State and payable in another, see *Kirtland v. Wanzer*, 2 Duer, 278; *Smith v. Ralston*, 1 Morris, Iowa, 87; *Young v. Bryan*, 6 Wheat. 146; *Bay v. Church*, 15 Conn. 15; *Payne v. Winn*, 2 Bay, 374; *Smith v. Little*, 10 N. H. 526; *City Bank v. Cutter*, 3 Pick. 414; *Evans v. Gordon*, 8 Port. Ala. 142; *Smith v. Gibbs*, 2 Smedes & M. 479; *Platt v. Drake*, 1 Doug. Mich. 296; *Pinkham v. Macy*, 9 Met. 174; *Coddington v. Davis*, 1 Comst. 186, 3 Denio. 16; *Burke v. McKay*, 2 How. 66; *Parke v. Lowrie*, 6 Watts & S. 507; *McFarland v. Pico*, 8 Calif. 626. But although it is not necessary to prove the dishonor of a note by protest, it does not follow that it may not be proved in that way. In *Carter v. Burley*, 9 N. H. 558, *Parker, C. J.* seemed inclined to the view that a promissory note, made by a resident of one State, and payable to a person residing in another, and indorsed so that it can be regarded as a bill, should be deemed a foreign bill so far as to admit the protest as evidence in itself; but the decision of this point was expressly waived. This point was again alluded to in *Smith v. Little*, 10 N. H. 526, 531; and finally the point was brought directly before the same court in *Williams v. Putnam*, 14 N. H. 540, and the same eminent judge declared that the court had no hesitation in adopting the conclusions to which the reasoning in those cases leads. "Each indorsement of a bill is in effect a new bill, drawn by the indorser upon the acceptor; and the similarity between

ever, very common in practice, and, as has been said, is the most convenient, and by force of usage might perhaps be regarded as the most regular way of giving notice, and establishing the facts of the case and the rights of the parties. It is held, however, in some of our States, that the notarial certificate of protest and notice of promissory notes is not a document known to the law.<sup>(h)</sup> And no protest will authorize any one to pay a note "for the honor of another." That is, if a stranger pays a note, he will acquire no rights against any party, unless he has the note transferred to him.<sup>(i)</sup>

Noting the protest means simply marking (usually and properly on the paper itself) the fact and time of the demand, the charges of minuting, and sometimes the place and the name of the parties of whom the demand is made, and it is signed by the initials of the notary. This is sometimes said to be not known to the law.<sup>(j)</sup> But the notary fills out his protest afterwards (and it is only a fuller statement of all these facts), or may testify in court as to the facts, by using the noting to revive his recollection.<sup>(k)</sup> The notary, by usage, makes the demand,

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the indorsement of notes and the drawing and indorsement of bills of exchange is so great, that there can be no sound reason given for establishing or preserving a distinction between them, and requiring a different character of evidence to prove the same facts with regard to two instruments, which, though different in some respects as to their phraseology, are so essentially similar in their nature and operation." And so in *Ticonic Bank v. Stackpole*, 41 Maine, 302, in an action against an indorser, such a note was treated as a foreign bill, and the notarial protest was held legally admissible as evidence by the common law, independently of any statutory regulation

(*h*) Thus in New York it is held that a promissory note payable in a foreign place cannot be regarded as a bill of exchange so as to enable a protest of it to be read in evidence. *Kirtland v. Wanzer*, 2 Duer, 278. In Indiana such a protest is admitted under the statutes of that State. *Shanklin v. Cooper*, 8 Blackf. 41; *Turner v. Rogers*, 8 Ind. 139.

(*i*) See *supra*, ch. 9, sect. 4. See also *Willis v. Hobson*, 37 Maine, 403, *supra*, p. 257.

(*j*) As by *Buller, J.*, in *Leftley v. Mills*, 4 T. R. 170. Thomson, a Scotch writer on Bills, p. 477, says, that "it seems to be now held in Scotland and England, that *noting* is a kind of incipient protest."

(*k*) It is said, that the protest may be formally drawn up or extended at any time before the commencement of a suit upon the bill, and truly antedated, provided it was noted in due time. *Chitty on Bills*, 477; *Story on Bills*, § 302; per Lord *Kenyon* and Lord *Ellenborough*, in *Chaters v. Bell*, 4 Esp. 48; *Orr v. Maginnis*, 7 East, 359; *Rogers v. Stevens*, 2 T. R. 713; *Robins v. Gibson*, 1 Maule & S. 288; *Goostrey v. Mead*, Buller, N. P. 271; *Cayuga Co. Bank v. Hunt*, 2 Hill, 635; *Bailey v. Dozier*, 6 How. 23. And it seems that the protest may be drawn up after legal proceedings have been instituted, and during their progress. *Brooke's Notary*, 97. Such, also, is the law, even in the case of payment *supra* protest for the honor of a drawer or indorser; for

and gives notice of non-payment to all prior parties.<sup>(l)</sup> And his notarial certificate should contain the protest, the time, manner, and place of the demand, and the names of the parties of whom the demand is made, of those at whose request it is made, and of the parties notified.<sup>(m)</sup> Nor will any merely verbal mistake

although to make a party to a foreign bill liable in such case to a person who takes up such bill for dishonor, it is necessary that a formal declaration of protest should, previously to so taking up the bill, have been made before a notary, that the payment was made for the honor of such party; yet it is not necessary that the instrument of protest should be formally drawn up at the time of such payment, but may be drawn up at any time afterwards, if before trial. *Geralopulo v. Weller*, 10 C. B. 690, 3 Eng. L. & Eq. 515.

<sup>(l)</sup> This is prescribed by statute in several of the States. *Supra*, p. 635, note *t*. But unless required by some State law, or some general usage equally binding, it is no part of the official duty of a notary by the law merchant to give notice of the dishonor of a promissory note. Per *Story*, J., in *Burke v. McKay*, 2 How. 66.

<sup>(m)</sup> Form of a protest for non-payment used in England, as given in *Brooke's Notary*, chap. 10:—

On the                day of               , one thousand eight hundred and               , I, R. B., Notary Public, duly admitted and sworn, dwelling in L——, in the county of L——, and United Kingdom of Great Britain and Ireland, at the request of C. D., of L—— (or of "the holder" or "the bearer," as the case may be), did exhibit the original bill of exchange, whereof a true copy is on the other side written, unto E. F. (or as the case may be, unto a clerk in the counting-house of E. F.), the person upon whom the said bill is drawn (and by whom the same is accepted, if the bill have been accepted), and demanded payment thereof (or payment being thereupon demanded), and he answered that it would not be paid. (*The substance of any other answer should be stated*) Wherefore, I, the said notary, at the request aforesaid, have protested, and by these presents do protest, against the drawer of the said bill, and all other persons thereto, and all others concerned, for all exchange, re-exchange, and all costs, damages, and interest, present and to come, for want of payment of the said bill.

Which I attest,

(Seal.)

R. B.

Notary Public, L——.

In a case where it appeared from the protest that the demand was made of the clerk of the drawees at their place of business, but it was not stated in the body of the protest that the drawees were absent, it was held that it was to be presumed in favor of the protest that the drawees were absent. *Gardner v. Bank of Tennessee*, 1 Swan, 420. See *supra*, p. 639, note *y*. So it will be presumed in favor of a notary who certifies that "On, &c., I did present the annexed draft of A on B, at the store of C," &c., that he presented the draft to the drawee in person. *Sharpe v. Drew*, 9 Ind. 281. In the protest of a bill, payable at a bank, and of which the bank is the holder, it is not necessary to give the name of the person or officer of the bank to whom it was presented, or by whom the notary was answered that it could not be paid. *Hildeburn v. Turner*, 5 How. 69. But it must appear from the certificate that the presentment was made at the bank, and it is not sufficient to say merely that it was made to the cashier of the bank. *Seneca Co. Bank v. Neass*, 5 Denio, 329. And so where a certificate of a notary stated that he presented the bill for payment to "one of the firm of W. C. & Co., the acceptors, and demanded payment, which was refused," it was held that the

or error in the notarial certificate vitiate it, if the protest and noting were properly made, and the notice properly given.(n)

The notarial charges are a legal charge, it is believed, only where the protest is required by the law merchant. But it is certainly usual to pay them where they are reasonable and made in good faith and in conformity with usage.

The absence of protest may, in general, be excused on the same grounds which excuse neglect of notice; and these excuses have been fully considered in a previous chapter.(o) Here it may be said, however, that protest is unnecessary if the drawer has neither funds in the hands of the drawee, nor any arrangement authorizing him to draw.(p) So it is if the drawer

certificate was defective in not stating the place where demand was made, as well as in not stating who composed the firm, or the name of the person of whom the demand was made. *Otsego Co. Bank v. Warren*, 18 Barb. 290. In *Elliott v. White*, 6 Jones, N. C. 98, it was held that a statement in the protest of a bill purporting to be drawn on a firm, that it was presented to A, one of the members thereof, was evidence of A's membership in that firm.

(n) Thus, where it was said that the acceptance was made by "Chas. Byrne," instead of "And. E. Byrne," as it was in the original bill, this error was not permitted to vitiate the protest. And the court said, that where the protest was duly noted, inasmuch as it might be drawn up and completed at any time before the commencement of the suit, or even before the trial, it consequently might be amended according to the truth, if any mistake had been made. *Dennistoun v. Stewart*, 17 How. 606. In *Bank at Decatur v. Hodges*, 9 Ala. 631, a mistake had been made in the certificate in describing the date of the bill; and the court said that a mistake made in extending the notarial act may be corrected at any time afterwards. "It is not the extension of the protest, but the fact that it is so protested, which is the essential matter." See *Johnson v. Cocks*, 7 Eng. Ark. 672. It is not necessary that it should appear in the protest *iisdem verbis* that the notary had the bill with him when he made demand, but the statement in the protest must *ex vi termini* import this. *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Union Bank v. Fowlkes*, 2 Sneed, 555. But in *Musson v. Lake*, 4 How. 262, it was held that a protest which states only that payment was demanded is not admissible in evidence to prove presentment of the bill. Upon identically the same question the contrary opinion was held in Louisiana. *Nott v. Beard*, 16 La. 308. And it may be remarked that in *Musson v. Lake*, *McLean* and *Woodbury*, JJ. dissented from the decision of the court, and were of opinion that the fair inference was that the bill was presented when the demand was made. It will be presumed in favor of the notary, that the presentment and demand were made at a proper time in the day *Burbank v. Beach*, 15 Barb. 326; *De Wolf v. Murray*, 2 Sandf. 166.

(o) See *supra*, chap. 13.

(p) The want of a protest, like the want of notice to the drawer, will not prejudice the holder as against the drawer, where the non-acceptance or non-payment of the bill is caused by the fraudulent act of the drawer. "The fact of drawing without funds, in the absence of other proof to explain it, is a fraud; for the bill is negotiated under the faith that the drawer has or will place effects in the hands of the drawee to meet the bill; and if he had no effects in the hands of the drawee, and knew that none would be

has admitted his liability, and promised to pay; (q) or has, in the bill itself, directed its return in case of non-payment, without protest or further charge. (r) In these cases it may, however, be doubted whether the protest is not still necessary to charge indorsers. (s) At all events, it would be the safest way.

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placed there, and that the drawee would not meet the bill, the whole transaction is deemed fraudulent on the part of the drawer. Another, but subordinate reason, is given for this exception, that the drawer cannot, in such case, be in any way injured for want of notice of non-payment. But it is the fraud in drawing and delivering such a bill upon which the exception substantially rests; for bankruptcy or notorious insolvency of the drawee, or proof that in fact no injury resulted from want of notice, will not excuse the holder from giving the drawer notice." Per *Saxton, J.*, in *Miser v. Trovinger*, 7 Ohio State, 281. See 2 Smith's Lead. Cases, pp. 22, 29; *Rogers v. Stevens*, 2 T. R. 713; *Legge v. Thorpe*, 12 East, 171, 2 Camp. 310; *Valk v. Simmons*, 4 Mason, 113. But it is no excuse for not giving notice of protest, that the drawer had no effects in the drawee's hands at the time when the bill was refused acceptance or afterwards, if he had some effects (to whatever amount) in the drawee's hands when the bill was drawn. *Orr v. Maginnis*, 7 East, 359. But the fact that the drawer or acceptor of a bill of exchange had no funds, or reasonable expectation thereof, at the place of payment, is no excuse for want of notice of protest for non-payment; the averment and proof should be, that the parties had no funds, or the reasonable expectation of them, in the hands of the drawee at the maturity of the bill; for the bill may have been drawn for the accommodation of the acceptor, or the acceptor may have had funds in his hands, but have neglected to place them in proper time at the place of payment. *Harwood v. Jarvis*, 5 Sneed, 375. Accommodation drawers, who unite as drawers with the person for whose accommodation they drew, are entitled to notice of protest if they had reason to expect their principal would provide funds to meet the bill. *Miser v. Trovinger*, 7 Ohio State, 281. The same principle holds with accommodation drawers generally. *Id.*; 2 Smith's Lead. Cases, 22, 29. And generally it is the settled rule of the English and American cases, that, although the drawer had no assets in the hands of the drawee, want of protest will not be excused if he had reasonable grounds to expect such funds. *Id.*

(q) *Patterson v. Becher*, 6 J. B. Moore, 319; *Gibbon v. Coggon*, 2 Camp. 188. In the latter case Lord *Ellenborough* said: "By the drawer's promise to pay, he admits his liability; he admits the existence of everything which is necessary to render him liable. . . . I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary." See also *Lonsdale v. Brown*, 4 Wash. C. C. 86; *Coddington v. Davis*, 1 Comst. 186; *Union Bank v. Hyde*, 6 Wheat. 572. The last two cases relate to waiver of protest of notes by express undertaking on the part of indorsers. See, upon the same point, *Sherer v. Easton Bank*, 33 Penn. State, 134; *Coddington v. Davis*, 3 Denio, 16. So where a drawer of a bill informed the holder before its maturity, that it would not be paid when due, this was a waiver of protest and notice. *Minturn v. Fisher*, 7 Calif. 573. And so the existence of a partnership between the drawer and acceptor, it seems, would excuse the want of protest and notice to the drawer. *Harwood v. Jarvis*, 5 Sneed, 375.

r) Chitty on Bills, 456.

(s) In *Warder v. Tucker*, 7 Mass. 449, and *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576, where the drawer had no effects in the hands of the drawee, it was held that

A promise after dishonor to pay a bill, of which protest and notice are necessary, may be sufficient *prima facie* evidence that such protest and notice had been made.(t)

## SECTION II.

### OF RE-EXCHANGE AND OTHER DAMAGES.

HE who draws a foreign bill of exchange makes an instrument which is intended to be used as if it were so much cash on demand, or on a certain day after sight or after date, at the place on which the bill is drawn. And he is bound to the remitter of the bill to make it this at its maturity, or the equivalent of this. This obligation gives rise (in case of non-payment at maturity) to what is called a right of re-exchange; which is defined to be the expense which the remitter incurs by having it dishonored in the foreign country in which it is drawn, duly presented, and returned to him, and taken up by him.(u) The

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an indorser of the bill was entitled to notice of a protest for non-acceptance, although he indorsed only for the accommodation of the drawer. But this would be otherwise if the indorser knew that there was no expectation that the bill would be accepted or paid. *Farmers' Bank v. Vanmeter*, 4 Rand. 553; 2 Smith's Lead. Cases, 29. See *Hansbrough v. Gray*, 3 Gratt. 356.

(t) *Gibbon v. Coggon*, 2 Camp. 188; *Levy v. Peters*, 9 S. & R. 125; *Pratte v. Hanly*, 1 Misso. 35; *Mense v. Osbern*, 5 id. 544.

(u) In addition to our own explanation, we give the clear statement of the nature of the transaction, and the relations which give rise to the question of exchange and re-exchange, as made by the counsel for the plaintiff in *De Tastet v. Baring*, 11 East, 265, 2 Camp. 65: "A merchant in London draws on his debtor in Lisbon a bill in favor of another for so much in the currency of Portugal, for which he receives its corresponding value at the time in English currency; and that corresponding value fluctuates from time to time, according to the greater or lesser demand there may be in the London market for bills on Lisbon, and the facility of obtaining them; the difference of that value constitutes the rate of exchange on Lisbon. The like circumstances and considerations take place at Lisbon, and constitute in like manner the rate of exchange on London. When the holder, therefore, of a London bill, drawn on Lisbon, is refused payment of it in Lisbon, the actual loss which he sustains is not the identical sum which he gave for the bill in London, but the amount of its contents if paid at Lisbon, where it was due, and the sum which it will cost him to replace that amount upon the spot by a bill upon London, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss, and the charge for re-exchange. And it is quite immaterial whether or not he in fact re-draws such a bill on London, and raises the money upon it in the Lisbon market."



meaning and operation of this may be thus illustrated. The drawer, having ten thousand dollars due to him in London, draws his bill on his debtor, and sells it to a party who owes, or is to owe, that sum at that place. The bill is remitted by the purchaser to his creditor or to his agent, as funds to pay his creditor, and it is dishonored. The remitter must now be indemnified. And this may happen in either of two ways. The remitter may draw a new bill, for such sum as will put his creditor in possession of the sum due, with legal interest and expenses of protest, etc., and as he must pay for this new bill whatever rate of exchange it is worth, and may claim of the drawer whatever it costs him, in this way the drawer pays to him the re-exchange; or the receiver of the bill in London may, on its dishonor there, draw a bill on the remitter for such sum as will enable him to sell the bill there for the amount which he ought to have received on the first bill, clear of all cost. Of course he must include in the bill the rate of exchange which will bring the market value of the bill in London up to this point. The remitter must pay this bill (including as it does

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ket; his loss by the dishonor of the London bill is exactly the same, and cannot depend on the circumstance whether he repay himself immediately by re-drawing for the amount of the former bill, with the addition of the charges upon it, including the amount of the re-exchange, if unfavorable to this country at the time, or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here; but that party is at all events liable to him for the difference, for as soon as the bill was dishonored, the holder was entitled to re-draw. That therefore is the period to look to. It ought not to depend on the rise or fall of the bill market, or exchange afterwards; for as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavorable to England before he redrew, so neither could the party here fairly insist on having the advantage, if the exchange happened to be more favorable when the bill was actually drawn. Where re-exchange has been recovered on the dishonor of a foreign bill, it has not been usual to prove that in fact another bill was re-drawn. If the quantum of damage is not to be ascertained by the existing rate of exchange at the time of the dishonor, the rule will become extremely complex for settling what is to be paid on the bill between different indorsees, each of whom takes it at the value of the exchange when he purchased it. If, then, the amount of the re-exchange between the two countries at the time of the dishonor be the true measure of damage which the holder at Lisbon was entitled to receive from his indorsee in England, and that re-exchange consists of the amount of a bill on London, which would put the holder of the dishonored bill in the same situation as if he had received the contents of it when due in Lisbon, it cannot make any difference whether the exchange between Lisbon and London at the time were carried on directly, or through the medium of other places. The more circuitous and difficult it was, the greater would be the loss of the holder by the dishonor."



this re-exchange), and then he has his claim against the drawer for all that it costs him. The acceptor, it is said, is not liable for re-exchange, as he is bound only for the sum he promises to pay, with legal interest.<sup>(v)</sup> But for this he is bound to the holder; and also to the drawer, if he pays the bill. And if the default of the acceptor compels the drawer to pay this bill, and these damages with it, it would seem, on general principles, that the drawer's claim on the acceptor should cover the whole amount.<sup>(w)</sup>

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(v) *Napier v. Shneider*, 12 East, 420 (May 30th, 1810); *Woolsey v. Crawford*, 2 Camp. 445 (May 28th, 1810). In the latter case, which was an action by the payee of a bill against the acceptor, Park, counsel for the plaintiff, contended that the defendant was answerable for all the damage that had been suffered by the plaintiff from the bill being dishonored. Lord *Ellenborough*: "You may as well state that, by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried farther than to pay the sum specified in the bill, and interest according to the legal rate of interest where it is due." In *Watt v. Riddle*, 8 Watts, 545, *Gilson*, C. J. said: "It was not a little remarkable that in so commercial a country as America the point submitted has not been raised before; nor is it less so, that it was first decided in England so late as 1810, and with so little remark as to the principle of the decision, though a novel and an important one. It came up in *Napier v. Shneider*, 12 East, 420, on a motion to direct that the master allow the expense of re-exchange on a judgment against the defendant as an acceptor; to which the court barely answered that it could not be done against one who had charged himself by his acceptance with no more than liability to pay according to the law of his country; and that if he do not, the holder has his remedy against the drawer." It was decided in this case that the statute of Pennsylvania, which gives liquidated damages as a substitute for re-exchange, has regard only to drawers and indorsors. By the Continental law the acceptor is liable for re-exchange. Pothier says that the acceptor is liable to pay re-exchange as the drawer is liable to pay it, to whose obligation the acceptor is taken to have become a party (*avoir accédé*) by his acceptance. Pothier de Change, n. 115-117, ch. 6, art. 4, § 1. The principle of accession, in the civil law, produces a unity of interest and obligation between parties that would otherwise be severally bound, and it seems to be the want of this principle which gave a different rule to the English law. That the acceptor is not liable for damages, see further, *Bowen v. Stoddard*, 10 Met. 375; *Newman v. Goza*, 2 La. Ann. 642; *Hanrick v. Farmers' Bank*, 8 Port. Ala. 539. He is made liable by statute in Missouri.

(w) Bayley on Bills, ch. 9, p. 353; *Riggs v. Lindsay*, 7 Cranch, 500. In this case the acceptors had expressly authorized and requested the drawer to draw upon them. And so in *Francis v. Rucker*, Ambler, 672, the bill having been drawn in pursuance of orders of the acceptors, the drawer was allowed by Lord Camden to prove his debt, including re-exchange against the acceptors, who had become bankrupt. See *Grimshaw v. Bender*, 6 Mass. 157, 161, for *dictum* of *Parsons*, C. J., and also a *dictum* in *Bowen v. Stoddard*, 10 Met. 375. Mr. Bayley says that "it seems reasonable that the acceptor should be liable to all parties where he has effects, and to all excepting the drawer where he has not." Bills, ch. 10, p. 456, note. But the authorities only go

The drawer is liable for re-exchange as soon as the bill is dishonored and protested, whether for non-acceptance or for non-payment,(x) and his liability is fixed in accordance with the laws of the country where the bill is drawn.(y) Nor is it a defence, that the payment of the bill was prevented by the government of the country in which it was drawn.(z) And in this

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to the extent, that if he has expressly or impliedly agreed with the drawer or indorser, for a valuable consideration, to pay the bill at its maturity, he is liable for a breach of his contract; and if he has funds of the drawer in his hands, he would perhaps be bound to accept. See *City Bank of New Orleans v. Girard Bank*, 10 La. 562.

(x) But the drawer is not liable to the indorser of a bill for damages incurred by the non-acceptance of the bill, unless the indorser has been obliged to pay them, or is liable for them. *Kingston v. Wilson*, 4 Wash. C. C. 310; *Bank of U. S. v. U. S.*, 2 How. 711, 764, 767.

(y) *Price v. Page*, 24 Misso. 65; *Story's Conf. of Laws*, § 307. In *Allen v. Kemble*, 5 Moore, P. C. 314, the court says: "The drawer by his contract undertakes that the drawee shall accept, and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow." See *Gibbs v. Fremont*, 9 Exch. 25, 20 Eng. L. & Eq. 555. And so in an action against an indorser of a bill of exchange, the law of the State where the indorsement was made must govern as to the rate of damages. *Cullum v. Casey*, 9 Port. Ala. 131. Such statutes have force only within the State enacting them. *Fiske v. Foster*, 10 Met. 597. Each successive party to a bill is liable for damages on its dishonor, according to the law of the place where the contract was made; and each indorsement is a new contract. *Story on Bills*, 153.

(z) *Mellish v. Simeon*, 2 H. Bl. 378. The facts of this interesting case were these: "On the 9th of July, 1793, two bills of exchange were drawn by Simeon in London on Boyd & Co. in Paris, one for 35,000, the other for 36,000 livres tournois. amounting together to £ 603 19s. 10d. sterling, according to the rate of exchange between London and Paris of 6½d. for the French crown of three livres, and payable to the order of Mellish & Co., who indorsed them in London to Jeyssset & Co. at Amsterdam. Jeyssset & Co. indorsed them to Meryolet at Amsterdam, and Meryolet to Androine at Paris. When they were presented for acceptance, Boyd & Co. refused to accept them, but promised that they should be paid when they became due. In the mean time, the French Convention passed a decree prohibiting the payment of any bills drawn in any of the countries at war with France, and of course the bills in question were not paid. In consequence of this, they were sent back by Androine to Meryolet at Amsterdam, protested for non-acceptance and non-payment, and at the same time Androine drew another bill on Meryolet for the amount of them, at the rate of 18½ groots for the French crown of three livres, for the re-exchange between Paris and Amsterdam, together with the ordinary charges, which bill Meryolet paid, and was reimbursed by Jeyssset & Co., by compromise between them, at the rate of 18 groots for the French crown, amounting to £ 905 13s. 9d. sterling, for which sum, together with charges at Amsterdam, and the re-exchange between that place and London, making

case, as well as in all others, if the bill is returned to him circuitously, through other countries, so that more than one re-exchange is added to it, he is liable for the whole, provided this circuitous return was in good faith and justified by circumstances, and was not unnecessary or wanton. (a) And although the whole doctrine and practice of re-exchange seems to belong exclusively to foreign bills of exchange, promissory notes may be so drawn as to bring them substantially under a similar rule. (b)

As the amount of re-exchange depends necessarily upon the course of business and the rate of exchange of the countries, it is legal and not unfrequent to determine the amount by anticipation. Thus, where the bill says, "In case of dishonor, re-exchange and expenses not to exceed £—, so much either per

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in the whole £913 4s. 3d. sterling, Jeysset & Co. drew a bill on Mellish & Co., which they paid, and took back the former bills, on which they brought the present action against Simcon, the drawer, and recovered a verdict for the whole sum of £913 4s. 3d. And now Le Blanc, Sergeant, moved for a new trial, on the ground, that the defendant was not liable for the loss on the re-exchange. It is true, he said, that the drawer of a bill of exchange undertakes, by the act of drawing it, that the drawee shall be found in the place where he is described to be, and shall have effects in his hands; but the undertaking does not extend to the case of a prohibition to accept or pay the bill imposed by the law of a foreign country in which the drawee resides. When a person takes a bill circumstanced as this was, he must submit to the laws of that country. There was no default in the drawer; he therefore cannot in justice be liable for more than the sum he originally received for the bills, with interest and the expenses of protesting them." Lord Chief Justice *Eyre*: "I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be part of the damages arising from the contract not being performed. I thought, indeed, at the trial, that it might be a question whether the drawer were liable for the re-exchange occasioned by the circuitous mode of returning the bills through Amsterdam, but the jury decided it." Buller, J.: "What is the engagement of the drawer of a bill of exchange? He undertakes that the bill shall be paid when due. If it be not paid, it is not necessary for the holder to inquire for what reason it is not paid, and if the holder has been guilty of no default, the drawer is answerable for the amount of the bill; and if he is liable for the bill, he must also be liable for the re-exchange, which is a consequence of the bill not being paid." Heath, J. was of the same opinion. He who undertakes for the act of another, undertakes that it shall be done at all events.

(a) *Mellish v. Simcon*, 2 H. Bl. 378; *De Tastet v. Baring*, 11 East, 265.

(b) As where a note was made "payable in Paris, or, at the choice of the bearer, in Dover or London, according to the course of exchange upon Paris," and shortly after all direct exchange ceased between London and Paris, though a circuitous course of exchange was maintained through Hamburg, it was held that the plaintiff was entitled to recover upon the note; according to the system of circuitous exchange existing at the time the note was presented for payment. *Pollard v. Herries*, 3 Bos. & P. 335

cent or in a gross sum," no holder of such a bill can go beyond this limit.(c) Nor could he claim so much under this phraseology, unless the re-exchange comes up to this. To avoid question and litigation, it is therefore better to say, "shall be so much," instead of "not to exceed."

This is precisely what the mercantile usages of this country, in the first place, and afterwards the State statutes, have done. It was first asserted as established mercantile usage in Massachusetts, and therefore as law, that ten per cent was payable as, or instead of, re-exchange in all cases of dishonor of a bill drawn in London.(d) Afterwards, this and sundry other rates of ex-

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(c) Chitty on Bills, 165.

(d) *Grimshaw v. Bender*, 6 Mass. 157, 161. Mr. Chief Justice *Parsons*, in delivering the opinion of the court in this case, said: "According to the law merchant, uncontrolled by any local usage, the holder is entitled to recover the face of the bill, and the charges of the protest, with interest from the time when the bill ought to have been paid, and also the price of re-exchange, so that he may purchase another good bill for the remittance of the money, and be indemnified for the damage arising from the delay of payment. But he cannot claim the ten per cent of the bill, which it is here the usage to pay. But the rule of damages established by the law merchant is, in our opinion, absolutely controlled by the immemorial usage in this State. Here the usage is, to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on those sums from the time when the bill should have been paid; and the further sum of one tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or at par. This usage is so ancient, that we cannot trace its origin; and it forms a part of the law merchant of the Commonwealth. Courts of law have always recognized it, and juries have been instructed to govern themselves by it in finding their verdicts. . . . The origin of this usage was probably founded in the convenience of avoiding all disputes about the price of re-exchange, and to induce purchasers to take their bills, by a liberal substitution of ten per cent instead of a claim for re-exchange. And such is the course of exchange between this State and England, that the usage is generally favorable to the holders of dishonored bills, and tends to discourage the drawing of bills by persons who have no funds to meet them." See Mass Stat. 1819, c. 41, and 1825, c. 177; R. S 1836, c. 33; Gen. Stats. 1860, c. 53. Mr. Chitty suggests the expediency of a fixed rule of damages instead of re-exchange. Bills, 188, 667, 668. The policy of establishing statutory damages in place of re-exchange is touched upon in *Lennig v. Ralston*, 23 Penn. State, 137, and it is declared that courts should give such statutes a liberal interpretation. "The dishonor of foreign bills," it is said, "may occur, and usually does occur, at points where the holders cannot supervise the result, and where they have neither means nor credit to provide against the injury. These instruments are generally procured at a premium by the holders, for the purpose of making their purchases in the country where the bills are payable, or as the means of pursuing their travels or maintaining their credit abroad. The great distance between the residence of the drawers and that of the acceptors must necessarily cause great delay in procuring indemnity

change, or of damages instead of them, between this State and various foreign countries, and between this State and other States, were established by law. Similar statutes exist now in other States.

These statutes, in the different States, are far from uniform. The inconvenience and frequent mischief arising from the diversity of the legal provisions on this subject have been strongly urged upon the attention of Congress, which, it is believed, has the power to regulate these damages by some uniform rule.<sup>(e)</sup> But the national legislature has as yet taken little or no action on the subject; and there seems to be but little hope of any establishment of a national and uniform rule. We give in our

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from the former. In the mean time, the loss to the holders, if they rely exclusively upon the bills to maintain their credit, and carry on their business, might be irreparable. Under such circumstances the recovery of the face of the bill only, with the usual interest, re-exchange, and costs, would be but a cold and inadequate remedy for so great an injury. The Act of 1821 was deemed necessary in order to do justice in such cases, and for the purpose of maintaining our commercial credit in other countries. It should receive such a construction as will best promote the intentions of the legislature in these respects." As far back as the year 1700, the legislature of Pennsylvania allowed twenty per cent damages, in lieu of re-exchange, on all bills drawn on England, or any part of Europe. *Francis v. Rucker*, Ambl. 672; *Hendricks v. Franklin*, 4 Johns. 119. In Rhode Island, as early as 1743, an act of similar purport was passed, fixing the damages at ten per cent. *Brown v. Van Braum*, 3 Dallas, 344. In *Hendricks v. Franklin*, 4 Johns. 119, which was an action on a bill drawn in New York on Liverpool, the plaintiff claimed twenty per cent damages and interest, together with two per cent for the difference of exchange, it being two per cent above par when the defendant was notified of the non-payment of the bill, in accordance with the usage of the Chamber of Commerce to allow for this difference. *Spencer, J.* said: "The right to recover twenty per cent damages on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decision. . . . It is presumed that our rule to allow twenty per cent on the protest of a foreign bill was originally coextensive with the rule established in Pennsylvania, and that the same reasons induced both rules. The twenty per cent was in lieu of damages in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant fluctuation and uncertainty of exchange. . . . I understand that merchants regulate themselves by the rules of the Chamber of Commerce. This, however, cannot make the law; the usage is too recent, and too unsupported by judicial countenance, to produce the consequences contended for. . . . In my opinion, the twenty per cent is in lieu of all claim for damages in such cases; and the claim for the difference in the price of the bills cannot be supported, and therefore it must be deducted in this case." In a subsequent case, however, in the Court of Errors, this rule was altered, and the holder allowed to recover at the rate of exchange at the time of the return of the bill. *Graves v. Dash*, 12 Johns. 17.

(e) See 2 Am. Jurist, p. 79; Mr. Verplanck's Report to the House of Representatives, March 22d, 1826.

notes a synopsis of the laws of the various States on this subject. (f)

(f) Alabama. The damages on inland bills of exchange, protested for non-payment, are ten per cent, and on foreign bills of exchange, protested for non-payment, fifteen per cent, on the sum drawn for. Such damages are in the place of all charges, except costs of protest, incurred previous to and at the time of giving notice of non-payment; but the holder may recover legal interest upon the aggregate amount of the principal sum specified in the bill, and of the damages thereon, from the time at which payment of the principal sum has been demanded, and costs of protest. When the amount in such bill is expressed in money of the United States, the damages allowed by the statute cover the rate of exchange; but bills payable in foreign currency have the rate of exchange added. The same damages are allowed on the dishonor of bills by non-acceptance, with interest on the principal sum from the time when the same would have become payable if accepted, and interest on the damages from the demand of acceptance. Code, 1852, §§ 1537-1541. Inland bills are defined to be such as are drawn and payable within the State; and those drawn in this State and payable elsewhere are foreign. Id., § 1549.

Arkansas. On every bill of exchange, expressed to be for value received, drawn or negotiated within the State, payable after date to order or bearer, and protested for non-acceptance or non-payment, the damages are as follows. For a bill drawn on any person, at any place within this State, at the rate of two per cent on the principal sum; for a bill payable in Alabama, Louisiana, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, or Missouri, or any point on the Ohio River, at the rate of four per cent; for a bill payable elsewhere in the United States, five per cent; for a bill payable beyond the limits of the United States, ten per cent. The acceptor of bills drawn on persons within the State is required to pay damages on bills protested for non-payment, as follows: if the bill is drawn by any person at any place within this State, at the rate of two per cent on the principal sum; if drawn at any place without this State, but within the limits of the United States, at six per cent; if drawn at any place without the limits of the United States, at ten per cent. Dig. of Stats. 1858, p. 209.

California. The damages on protested bills of exchange, drawn or negotiated within this State, are as follows. If drawn upon any person in any of the United States, east of the Rocky Mountains, fifteen per cent; if drawn upon any person in Europe, or in any foreign country, twenty per cent. Such damages are in lieu of interest and all charges previous to the giving notice of dishonor. If the contents of such bill be expressed in the money or currency of any foreign country, then the amount due, exclusive of the damages payable thereon, shall be ascertained by the rate of exchange, or the value of such foreign currency at the time of the demand of payment or acceptance. The holder of the bill cannot recover damages unless he has paid value therefor. Wood's Dig. 1858, p. 72. The acceptance of payment of one of the set of bills is a waiver of all claim for damages for the previous dishonor of another one of the set. Page v. Warner, 4 Calif. 395.

Connecticut. The damages on bills of exchange drawn or indorsed in this State, payable in any other State, Territory, or District of the United States, and returned protested, are, besides interest, as follows. If such bill shall have been drawn upon any person in the city of New York, two per cent; if upon any person in the States of New Hampshire, Vermont, Maine, Massachusetts, Rhode Island; New York (except the city of New York), New Jersey, Pennsylvania, Delaware, Maryland, or Virginia, or in the District of Columbia, three per cent; if upon any person in the States of North



**It will be seen that, generally, the rate of damages in-**

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Carolina, South Carolina, Ohio, or Georgia, five per cent; if upon any person in any other State, Territory, or District of the United States, eight per cent; and such damages shall be instead of interest and all other charges up to the time of giving notice of dishonor. Stats., compilation of 1854, p. 696.

Delaware. The damages on bills of exchange drawn on any person beyond seas, and returned unpaid with legal protest, shall, as to the drawer, indorser, and all concerned, be at the rate of twenty per cent on the contents of such bills, in addition thereto. Rev. Code, 1852, p. 183.

Florida. Damages on foreign protested bills of exchange are at the rate of five per cent. Thompson's Dig. 1847, p. 349.

Georgia. Upon bills of exchange drawn in this State upon any person within the United States, out of this State, returned duly protested, the holder is entitled to recover five per cent damages over and above the principal sum, together with lawful interest on the aggregate amount from the time of giving notice of protest and making demand of payment. Upon such bills drawn on any place beyond the limits of the United States the holder may recover the principal, with postage, protests, and other necessary expenses, and interest on the amount of these sums from the date of the protest until the presenting of the same for payment in this State, at the rate established at the place at which the bill was payable; and also the premium on such aggregate amount as good bills of like description are worth at the time and place of demand; but if such bills are then and there at a discount, the holder is to deduct the discount; and the holder recovers damages at the rate of ten per cent on the principal sum, with Georgia interest. Cobb's New Dig. 1851, Vol. I. p. 521.

Illinois. The damages on bills of exchange expressed for value received, payable in foreign countries and protested for non-payment or non-acceptance, are ten per cent on the principal, together with interest and the costs and charges of protest. On such bills payable out of this State, but within the United States or their Territories, the holder recovers five per cent, together with interest and costs, and charges of protest. Stats. Comp. 1858, Vol. I. p. 290.

Indiana. Damages payable on protest for non-payment or non-acceptance of a bill of exchange, drawn or negotiated within this State, are, if drawn upon any person, at any place out of this State, but within the United States, five per cent; but if upon any person at any place without the United States, ten per cent on the principal of such bill. Beyond such damages, no interest or charges accruing prior to protest are allowed; but interest from the date of the protest may be recovered. As to any bill payable within the United States, the rate of exchange is not taken into account. No damages beyond cost of protest are chargeable against drawer or indorser, if, upon notice of protest and demand of the principal sum, the same is paid, nor can the holder recover damages unless he has given value therefor. 1 R. S. 1852, p. 379. A bill drawn by a person resident in Indiana, payable in New Orleans, and directed to himself in that city, was held, upon protest for non-payment, to come within the equity of the statute, and the drawer was made liable to five per cent damages. *State Bank v. Bowers*, 8 Blackf. 72. See *Ohio, post*, p. 659, and *Wood v. Farm. & Mech. Bank*, 7 T. B. Mon. 281. In *State Bank v. Rodgers*, 3 Ind. 53, a bill payable at Cincinnati, the parties being all residents of Indiana, was also held to be within the statute. Under the provision allowing the drawer or indorser, upon notice of protest, and a demand of the principal, to avoid damages by payment, a notice of a protest is a sufficient demand of payment, without any averment of a special demand. *May v. State Bank*, 9 Ind. 233.



creases with the distance of the place upon which the bill is drawn.

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**Iowa.** The damages on bills of exchange drawn or indorsed within this State, and protested for non-acceptance or non-payment, are, for bills drawn upon a person at a place out of the United States, or in California, Oregon, Utah, or New Mexico, ten per cent upon the principal, with interest from the time of protest; for bills upon a person at a place in Iowa, Missouri, Illinois, Wisconsin, or Minnesota, three per cent, with interest; for bills upon Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, Indiana, Ohio, Virginia, District of Columbia, Pennsylvania, Maryland, New Jersey, New York, Massachusetts, Rhode Island, or Connecticut, five per cent, with interest; for bills drawn upon a person at a place in any other State in the United States, eight per cent, with interest. Code 1851, p. 151, § 965.

**Kentucky.** Where any bill of exchange, drawn on any person out of the United States, is protested for non-payment or non-acceptance, it bears ten per cent per year interest, from the day of protest, for not longer than eighteen months, unless payment be sooner demanded from the party to be charged. Such interest is recovered up to the time of the judgment, and the judgment bears legal interest thereafter. Damages on all other bills are disallowed. R. S. 1852, p. 194.

**Louisiana.** The rate of damages to be allowed upon the usual protest for non-acceptance or non-payment of bills of exchange drawn or negotiated in this State is, on bills drawn on and payable in foreign countries, ten per cent; on all bills drawn on and payable in any other State in the United States, five per cent on the principal sum specified in such bill. Damages are in lieu of interest, charges of protest, and all other charges incurred previous to and at the time of giving notice of non-acceptance or non-payment, but the holder is entitled to recover lawful interest upon the aggregate amount of the principal sum, and of the damages thereon from the time at which notice of protest for non-acceptance or non-payment shall have been given and payment demanded. When the contents of the bill are expressed in the money of the United States, the amount of the principal and of the damages is ascertained, without any reference to the rate of exchange; but when expressed in a foreign currency, the principal and damages are determined by the rate of exchange; but when the value of such foreign coin is fixed by the laws of the United States, the value thus fixed must prevail. R. S. 1856, pp. 43, 44.

**Maine.** Damages on protest of bills of exchange of a hundred dollars or more, payable by the acceptor, drawer, or indorser of one in this State, are, if payable at a place seventy-five miles distant, one per cent; if payable in the State of New York, or in any State northerly of it, and not in this State, three per cent; if payable in any Atlantic State or Territory southerly of New York and northerly of Florida, six per cent; and in any other State or Territory, nine per cent. R. S. 1857, c. 82, § 35, p. 519.

**Maryland.** The holder of a bill of exchange drawn in the State on any person in a foreign country, regularly protested, is entitled to recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent damages, with costs of protest and interest; if drawn on any person in any other of the United States, and protested, the holder may recover in the same way a sum sufficient to buy another bill of the same tenor, and eight per cent damages on the principal sum, and interest from the time of protest, and costs. It is also provided that indorsers of such bills, who shall have paid the principal and the damages prescribed by statute, may recover the same, with interest thereon from the drawer or any other person liable to him upon the bill. Laws, Dorsey's ed., Vol. I. p. 197. The indorser of a bill, remit-

### The liability for the payment of the damages allowed by statute

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ted to his original character as holder and payee, cannot recover under the last section of this statute, but only as holder. *Bank of U. S. v. United States*, 2 How. 711.

**Massachusetts.** On bills of exchange, negotiated in Massachusetts, payable without the limits of the United States, (excepting places in Africa beyond the Cape of Good Hope, and places in Asia and the islands thereof,) the party liable shall pay at the current rate of exchange, and damages at the rate of five per cent upon the contents, together with interest thereon from the date of the protest; but on bills payable in Africa beyond the Cape of Good Hope, or any place in Asia or the islands thereof, the party liable shall pay the same at the par value thereof, with twenty per cent thereon in full of all damages, interest, and charges. On bills payable within the States of Maine, New Hampshire, Vermont, Rhode Island, Connecticut, or New York, the party liable shall pay two per cent with interest and costs; on bills payable in New Jersey, Pennsylvania, Maryland, or Delaware, three per cent; Virginia, North Carolina, South Carolina, Georgia, or the District of Columbia, four per cent; and if in any other of the United States or the Territories thereof, five per cent. Damages on bills for a sum not less than one hundred dollars, and payable within the State, at a distance of not less than seventy-five miles from the place where they were drawn or indorsed, are one per cent. R. S. 1836, c. 33, §§ 1 - 4; Laws of 1837, p. 239; Gen. Stats. 1860, c. 53.

**Michigan.** Whenever any bill of exchange, drawn or indorsed within this State, and payable without the limits of the United States, is protested for non-acceptance or non-payment, the party liable shall pay the contents at the current rate of exchange at the time of demand, and damages at the rate of five per cent, together with interest from the date of protest; and such payment shall be in full of all damages, charges, and expenses. The damages on bills payable in Wisconsin, Illinois, Indiana, Pennsylvania, Ohio, or New York are three per cent; on bills payable in Missouri, Kentucky, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, or the District of Columbia, five per cent; on bills payable elsewhere without this State and within the United States or the Territories thereof, ten per cent. Compiled Laws, 1857, Vol. I. p. 408.

**Minnesota.** On bills of exchange drawn or indorsed within this State, and payable without the limits of the United States, and duly protested for non-acceptance or non-payment, the party liable shall pay the contents at the current rate of exchange at the time of demand, and damages at the rate of ten per cent, together with interest from the date of protest; and said amount of contents, damages, and interest is in full of all damages, charges, and expenses. The damages on bills drawn on any person out of this State, but within some State or Territory of the United States, are at the rate of five per cent, together with interest and costs and charges of protest. Stats. Compiled, 1858, p. 375.

**Mississippi.** The damages on all bills of exchange drawn in this State upon any person resident within the United States and out of this State, and returned protested for non-acceptance, are five per cent, and interest on the principal; on bills payable out of the United States, and protested for non-acceptance or non-payment, they are ten per cent, and interest on the principal; and in all cases the holder is entitled to all costs and charges. Code 1857, p. 356.

**Missouri.** The damages on bills of exchange drawn or negotiated within this State, and protested for non-acceptance or non-payment, are as follows. If drawn on any person at any place within this State, four per cent on the principal; if drawn on any person without this State, but within the United States or the Territories thereof, ten per cent; if drawn on any person at any port or place without the United States and their

for re-exchange becomes perfect on the return of the bill pro-

Territories, twenty per cent. The acceptor is made liable to damages upon protest for non-payment of bills accepted in this State, at the rate of four per cent on the principal sum; on bills accepted at any place without this State, but within the United States or their Territories, at the rate of ten per cent; and on bills accepted beyond the United States and their Territories, at the rate of twenty per cent. These damages can be recovered only by a holder for a valuable consideration. The damages are in lieu of interest, charges of protest, and other charges previous to and at the time of giving notice of dishonor. When the bills are payable in money of the United States, the rate of exchange is disregarded; but when payable in foreign currency, the amount due, exclusive of damages, is ascertained by the rate of exchange at the time of payment. R. S. 1855, Vol. I. pp. 293-295. That the bill must contain the words "for value received," in order to entitle the holder to damages, see *Hallowell v. Page*, 24 Misso. 590; *Riggs v. City of St. Louis*, 7 id. 438.

New York. The rate of damages to be allowed and paid upon the usual protest for non-payment or non-acceptance of bills of exchange, drawn or negotiated within this State, is, for bills payable in either of the Eastern or New England States, in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, or Virginia, or in the District of Columbia, three per cent; for bills payable in North Carolina, South Carolina, Georgia, Kentucky, or Tennessee, five per cent; for bills payable in any other State or Territory of the United States, or at any other place on or adjacent to this continent and north of the equator, or in any British or other foreign possessions in the West Indies, or elsewhere in the Western Atlantic Ocean, ten per cent; for bills payable in any port or place in Europe, ten per cent. These damages are in lieu of interest, charges of protest, and all other charges incurred previous to and at the time of giving notice of non-payment or non-acceptance; but the holder may recover subsequent interest and damages. Where the contents of the bill are expressed in the money of account or currency of any foreign country, the amount due, exclusive of the damages payable thereon, is to be ascertained and determined by the rate of exchange, or the value of such foreign currency at the time of the demand of payment. The holder of the bill cannot recover damages unless he has paid value therefor. 2 R. S. p. 179, 180, 4th ed.

North Carolina. The damages on protested bills of exchange, drawn or indorsed in this State, are as follows. For bills drawn upon any person in any other of the United States, or in any of the Territories thereof, three per cent; for bills payable in any other place in North America (excepting the Northwest Coast of America), or in any of the West India or Bahama Islands, ten per cent; for bills payable in the island of Madeira, the Canaries, the Azores, the Cape de Verd Islands, or in any other state or place in Europe or South America, fifteen per cent; if payable in any other part of the world, twenty per cent on the principal sum. R. Code, 1854, c. 13, pp. 111, 112.

Ohio. The damages on bills of exchange negotiated in this State, drawn on any person without the jurisdiction of the United States, and returned protested, are twelve per cent; upon bills drawn on any person within the jurisdiction of the United States, and without the jurisdiction of this State, six per cent. The bills in all cases bear interest of six per cent from the date of protest. No damages are recoverable in case there is an agreement or understanding between the drawer or indorser and the payee or indorsee, permitting the bill to be paid at any other place than that on which it was drawn. R. S. 1854, Swan's ed., p. 576. Under this statute it is held that damages cannot be recovered on a bill drawn upon a person resident in Ohio, although payable in New York. *Farmers' Bank v. Brainerd*, 8 Ohio, 292. But where a bill was drawn in Cincinnati, directed to "T. & C., New Orleans," T. & C. being a firm having busi-

tested, and is as fixed and determinate an obligation as the debt

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ness houses both in New Orleans and Cincinnati, T. residing in the former city and C. in the latter, and the bill was accepted for the New Orleans house by C. at Cincinnati, and at maturity was presented for payment to the house in New Orleans, and protested for non-payment, it was held that the drawers were liable to pay six per cent damages, according to the statute. The former case was distinguished from this by the fact that the bill in that case was drawn, not on a *firm*, but an *individual*, resident within the State, and not appearing to have any place of business, without the State, at which the bill was addressed to him. *West v. Valley Bank*, 6 Ohio State, 168. See *Indiana, ante*, p. 656, for decisions to the like effect of that in *Farmers' Bank v. Brainerd*, 8 Ohio, 292. See *Cox v. Bank of Tennessee*, 3 Sneed, 140; *Clay v. Hopkins*, 3 A. K. Marsh. 485; *Bank of U. S. v. Daniel*, 12 Pet. 32, 53. To entitle the holder of a bill drawn in Ohio on another State to recover the statutory damages, a protest is necessary. *Case v. Heffner*, 10 Ohio, 180, 187.

Oregon. The damages on bills of exchange, drawn or indorsed in this State, and payable beyond the limits of the United States, are at the rate of ten per cent in addition to the current rate of exchange, together with interest from date of protest; and such amount of contents, damages, and interest is in full of all damages, charges, and expenses. On bills payable out of this State, but within some State or Territory of the United States, the damages are five per cent, with interest and costs and charges of protest. *Comp. Stats. 1855*, p. 531.

Pennsylvania. The damages on bills of exchange drawn or indorsed in this State, and returned for non-acceptance or non-payment with a legal protest, over and above the principal sum and lawful interest, and charges of protest, from the time at which notice of such protest shall have been given, are, for bills payable in any of the United States or Territories thereof, excepting Upper and Lower California, New Mexico, and Oregon, five per cent; for bills payable in these excepted States and Territories, ten per cent; for bills payable in China, India, or other parts of Asia, Africa, or islands in the Pacific Ocean, twenty per cent; for bills upon Mexico, the Spanish Main, West Indies or other Atlantic islands, east coast of South America, Great Britain, or other places in Europe, ten per cent; for bills upon places on the west coast of South America, fifteen per cent; and for bills upon any other part of the world ten per cent upon such principal sum. The amount of such bill, and of the damages payable thereon, is ascertained and determined by the rate of exchange, or value of the money or currency mentioned in such bill at the time of notice of protest and demand of payment. *Purdon's Dig. 1857*, p. 91; *Acts of 1821 and 1850*. This statute has regard only to drawers and indorsers, and not to acceptors of bills. *Watt v. Riddle*, 8 Watts, 545.

Rhode Island. Bills drawn or indorsed in this State, and returned from any place or country without the limits of the United States protested for non-acceptance or non-payment, subject the drawer or indorser to the payment of ten per cent damages thereon, and charges of protest, with interest. The damages on bills payable in other States of the United States, and returned under protest, are five per cent, together with charges of protest and interest, from the date of protest. *R. S. 1857*, c. 122, §§ 1-3, p. 277.

South Carolina. The damages on bills of exchange drawn upon persons resident within the United States, and out of this State, and returned protested, are ten per cent; and on all bills in like manner drawn upon persons resident in any other part of North America, or within any of the West India Islands, and protested, the damages are twelve and a half per cent; and on all bills drawn on persons resident in any other part of the world, fifteen per cent, and all charges incidental thereto, with lawful interest, until the same be paid. *Stats. at Large*, Vol. IV. p. 741; *Act of 1786*.

itself; (g) and damages may be recovered without being specially

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Tennessee. When a bill of exchange, drawn or indorsed in this State, upon any person of or in any other State or Territory, is returned protested, the payee may recover from the drawer or indorsers, besides the principal, interest, and charges of protest, damages at the following rates per cent upon the principal sum: Three per cent, if the bill was drawn upon a person of or in any of the United States or Territories thereof; fifteen per cent, if drawn upon any person of or in any other State or place in North America bordering upon the Gulf of Mexico, or of or in any of the West India Islands. The damages are in lieu of interest and all other charges, except charges of protest, to the time when notice of the protest and demand of payment shall have been given; but interest shall be computed from that time on the principal, together with the damages and charges of protest. Code 1858, §§ 1963, 1964. It is held that a bill drawn and accepted in this State, all the parties to which reside in this State, but payable in another State, is not such a bill as is contemplated in the statute, upon protest of which three per cent damages can be recovered by the holder. *Cox v. Bank of Tennessee*, 3 Sneed, 140.

Texas. The damages on bills of exchange drawn in this State, upon any person living beyond the limits of this State, are ten per cent on the amount of such bill, together with interest and costs of suit thereon, accruing when the liability of the drawer or indorser of such bill has been fixed by the commencement of a suit instead of a protest. *Oldham & Whiten*, Dig. 1859.

Virginia. When a bill of exchange, drawn or indorsed within this State, is protested for non-acceptance or non-payment, the party liable shall pay damages upon the principal, at the rate of three per cent if the bill be payable out of Virginia and within the United States, and at the rate of ten per cent if the bill be payable without the United States. Code 1849, p. 582.

Wisconsin. Whenever any bill of exchange drawn or indorsed within this State, and payable without the limits of the United States, shall be duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall pay the same at the current rate of exchange at the time of the demand, and damages at the rate of five per cent upon the contents thereof, together with interest on the said contents, to be computed from the date of the protest; and said amount of contents, damages, and interest shall be in full of all damages, charges, and expenses. The damages on bills of exchange, payable within some State or Territory of the United States adjoining this State, are five per cent, together with costs and charges of protest and interest. On bills drawn on other States, the holder recovers ten per cent damages, together with costs and charges of protest and legal interest. R. S. 1858, c. 60, §§ 8-10, p. 409.

(g) *Hargous v. Lahens*, 3 Sandf. 213. It was held in this case that the holder of a foreign bill is entitled to his damages, on its non-payment, upon the whole amount of the bill, although he may subsequently to the protest receive part payment of the bill from the acceptor at the place where it is due and payable. *Laing v. Barclay*, 3 Stark. 38, and *Bangor Bank v. Hook*, 5 Greenl. 174, to the contrary, are reviewed. "Now it is obvious," says *Sandford*, J., "that the subsequent collection of the amount of the protested bill at the place where it was payable will not make the remitter whole in the transaction, unless it shall so happen that the rate of exchange is at that time so favorable to him that he can sell a bill drawn by him against such collection for as much as it cost him to remit and take up the protested bill when he received notice of its dishonor, together with his expenses in the collection. Thus the result in reference to an actual reimbursement of the remitter, or a restoration to the same state he would have

laid in the declaration. (*h*) It is said, however, that an averment of protest is necessary to the recovery of damages, because they accrue only on the protest. (*i*) It is generally held that these damages are not regarded in law as a penalty, but as a compensation made necessary by the principle of indemnity. (*j*)

To the sum due on the face of the paper, legal interest, from the time when it became due, should be added. Noting, postages, and perhaps any other necessary expenses, may also be recovered; but a money count should be added to the declaration to cover these charges. (*k*)

If an indorser is sued, and, by a judgment against him, compelled to pay, he cannot ordinarily charge the costs of suit, or the expenses of his defence, to prior parties; for his remedy against them is limited to what he must have paid without suit. (*l*) If, however, the party thus obliged to pay was an accommodation party, that is, if he drew, accepted, or indorsed the paper wholly and knowingly without consideration, and with intention to accommodate another party, he may charge

been in if the bill had been paid according to its tenor and obligation, would depend upon the fluctuations of exchange, the credit of the holder as a drawer of foreign bills, the continued solvency of his agent abroad, and other considerations which we need not enumerate. It was intended by the rule of fixed damages provided in the statute to avoid all inquiries of this character in every case of protested bills of exchange." See *contra*, *Warren v. Coombs*, 20 Maine, 139.

(*h*) *Lloyd v. McGarr*, 3 Barr, 474, per *Gibson*, C. J. The damages allowed by statute are not given as a penalty for drawing without authority, but as commutation for interest, damages, and re-exchange. It is in truth, a liquidation of the damages, not by the parties, but by the law, fixing the compensation for the loss beforehand, to save time and litigation; and if damages need not be specially laid where there is no statute on the subject, as they certainly need not be in England, no rule of pleading requires them to be laid in their liquidated form. In *Bank of U. S. v. United States*, 2 How. 711, 737, *McLean*, J. remarked, that the damages on bills of exchange given by the statute are as much a part of the contract as the interest.

(*i*) *Jordan v. Bell*, 8 Port. Ala. 53.

(*j*) Among the leading authorities on this point are *Lennig v. Ralston*, 23 Penn. State, 137, 140; *Allen v. Union Bank of Louisiana*, 5 Whart. 420, 425; *Bangor Bank v. Hook*, 5 Greenl. 174.

(*k*) *Kendrick v. Lomax*, 2 Crompt. & J. 405, 2 Tyrw. 488; *Bolland*, B.: "I have always heard it stated, that if there was no count specially stating them, these charges could not be recovered. Interest is clearly different. It flows out of the contract."

(*l*) *Dawson v. Morgan*, 9 B. & C. 618; *Roach v. Thompson*, 4 Car. & P. 194; *Simpson v. Griffin*, 9 Johns. 131; *Steele v. Sawyer*, 2 McCord, 459. In *King v. Phillips*, Pet. C. C. 350, the question whether the indorsers of a bill could recover the costs of a suit against them was intended to be submitted to the court, but the court said that it could not arise on the declaration, inasmuch as there was no money count in it.



to this other party, not only the face of the paper, but the costs of an action against him. We know no authority, however, which permits him to charge expenses as well as costs. And undoubtedly the charge of costs would be excluded if the party accommodated could show that the defence to the suit was wholly unnecessary and unjustified.

It may be well to remark, that the rate of exchange is sometimes natural and sometimes artificial; and sometimes it contains both of these elements. Thus, our exchange on England is never *nominally* at par, because our statute makes the pound sterling equal to only four dollars and forty-four cents; which is nearly ten per cent less than it is really when paid in gold. Accordingly, while £ 100 sterling is legally worth only \$ 444, to pay that sum in London one must pay in New York, if the exchange is actually at par, about \$ 484. A recent United States statute has provided, that, for the purpose of estimating duties on imported goods, the pound sterling shall be calculated at four dollars and eighty-four cents, which is about its true value.<sup>(m)</sup> But the matter of exchange is left to itself. Merchants regulate that by adding from nine to ten per cent to the actual rate of the day (or that which would be the rate if it were determined by business alone), and thus the buying and selling rate is made. This is seldom less than eight per cent, for if it falls so low, or nearly so low, gold comes over from England; and seldom more than eleven, for if it rises so high, or near this rate, gold, instead of bills, is sent to England.

If a foreign creditor sues his debtor in this country, *not on a bill of exchange*, many authorities say that he recovers his debt only at the legal par of exchange, without any allowance or increase for the rate of exchange, either natural or artificial.<sup>(n)</sup>

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(m) Statute of July 27, 1842, c. 66, 5 U. S. Stats. at Large, 496.

(n) In *Martin v. Franklin*, 4 Johns. 124, the plaintiffs were merchants in Liverpool, and it was admitted that the debt was contracted in Great Britain, and that the accounts between the parties are in sterling money. The declaration stated the defendants as being indebted to the plaintiffs in the city of New York. The court held that "the debt is to be paid according to the par, and not the rate of exchange. It is recoverable and payable here to the plaintiffs or their agent; and the courts are not to inquire into the disposition of the debt, after it reaches the hands of the agent. He may remit the debt to his principal abroad, in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the United States, or to other countries on the same account. We cannot trace the disposition which is to take place subsequent to the recovery, nor award special damages upon such uncertain cal-



But this rule would plainly operate injustice to an English creditor, to the amount at least of the difference between the legal par, or, as it may be called, the artificial par, and the natural par. For if one owing £ 1,000 in London could pay that in New York with \$ 4,444, the English creditor would lose by the error of our law the difference between that sum and \$ 4,844, which, because the actual par, is adopted by our country for all purposes of revenue.

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culations. All that the plaintiffs can ask is their debt justly liquidated and paid in the lawful currency of the United States."

In *Adams v. Cordis*, 8 Pick. 260, the court, citing the above, say that they subscribe to this doctrine. Of the case of *Smith v. Shaw*, 2 Wash. C. C. 167, to the contrary, the court remark, that it is of very little authority, as the point was not stated in argument, and was settled suddenly by the court without advancing any reason in support of it. In *Lodge v. Spooner*, 8 Gray, 166, a certain sum of money was to be paid in China on the performance of an agreement entered into between the parties. The plaintiff performed his part of the contract, and claimed to recover, in addition to the original sum and interest, the rate of exchange between this country and China at the time when the money should have been paid. But the court held that he was not entitled to the exchange, and evidence that there was no tribunal in China in which one foreigner could recover of another, and that these funds were to be invested in China, was held to be inadmissible. In *Weed v. Miller*, 1 McLean, 423, after reviewing the authorities, the court say that, at all events, the rate of exchange is not recoverable on a note of hand where the declaration lays the venue in the State where the suit is brought, and there is no count nor allegation to cover the difference of exchange, although the difference of exchange may always be recovered on a bill of exchange. But the rate of exchange may be recovered on a promissory note given in New York, payable at Detroit, when it is expressly stated to be payable with the current rate of exchange. *Grutacap v. Woulluisse*, 2 McLean, 581; *Scotfield v. Day*, 20 Johns. 102. But, on the other hand, the English decisions and some American decisions are in favor of allowing a foreign creditor to be paid at the rate of exchange. *Scott v. Bevan*, 2 B. & Ad. 78; *Cash v. Kennion*, 11 Ves. 314; *Grant v. Healey*, 3 Sumner, 523. And see *Howard v. Central Bank*, 3 Ga. 375; *Bank of Missouri v. Wright*, 10 Misso. 719. In *Grant v. Healey*, 3 Sumner, 523, Mr. Justice *Story*, delivering the opinion of the court, said: "I take the general doctrine to be clear, that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay; for then, and then only, is he fully indemnified for the violation of the contract. In every such case, the plaintiff is, therefore, entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to, or subtracted from, the amount, as the case may require, in order to replace the money in the country where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice. . . . It is suggested, that the case of bills of exchange stands upon a distinct ground, that of usage; and is an exception from the general doctrine. I think otherwise."

















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